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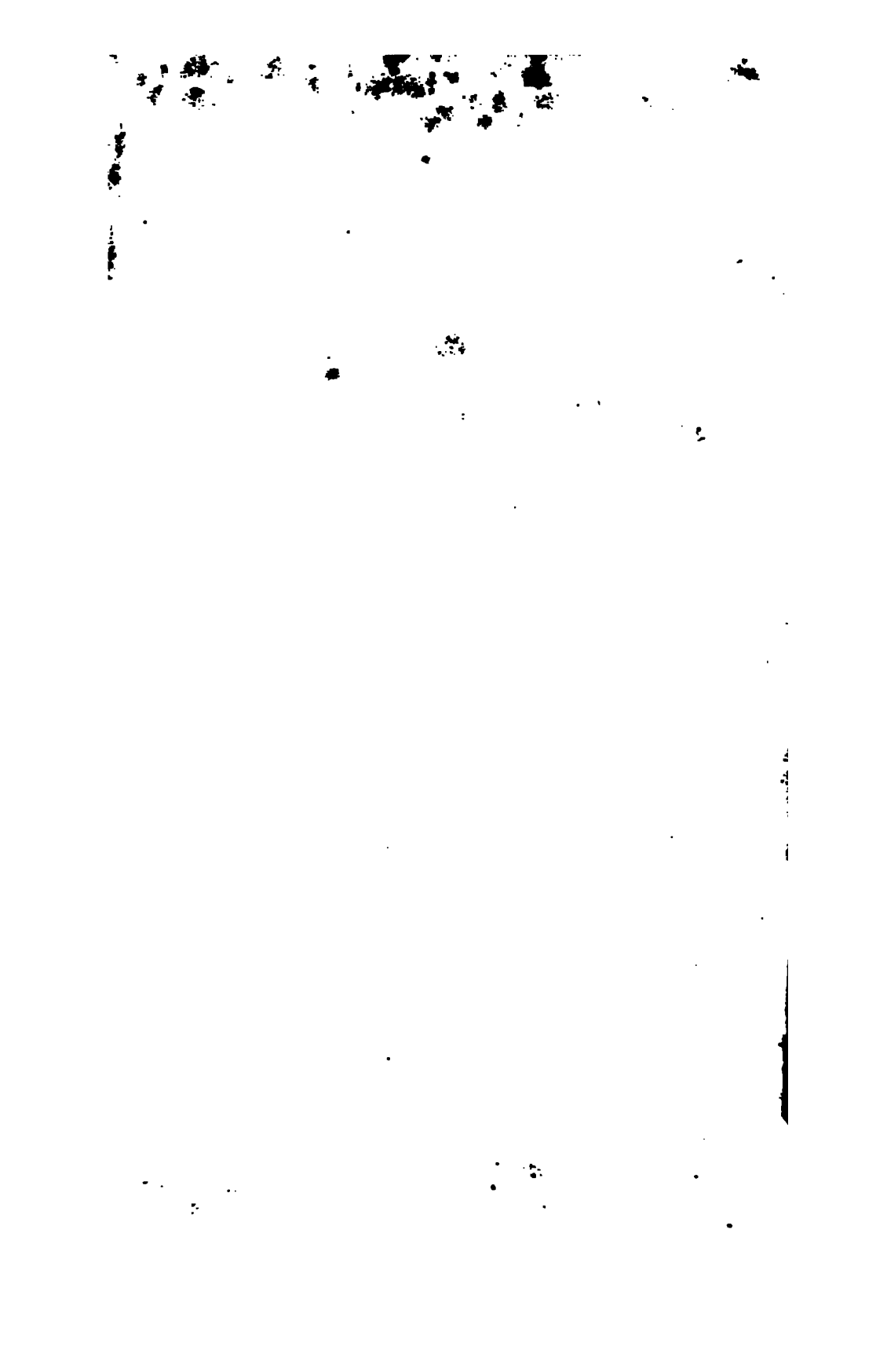
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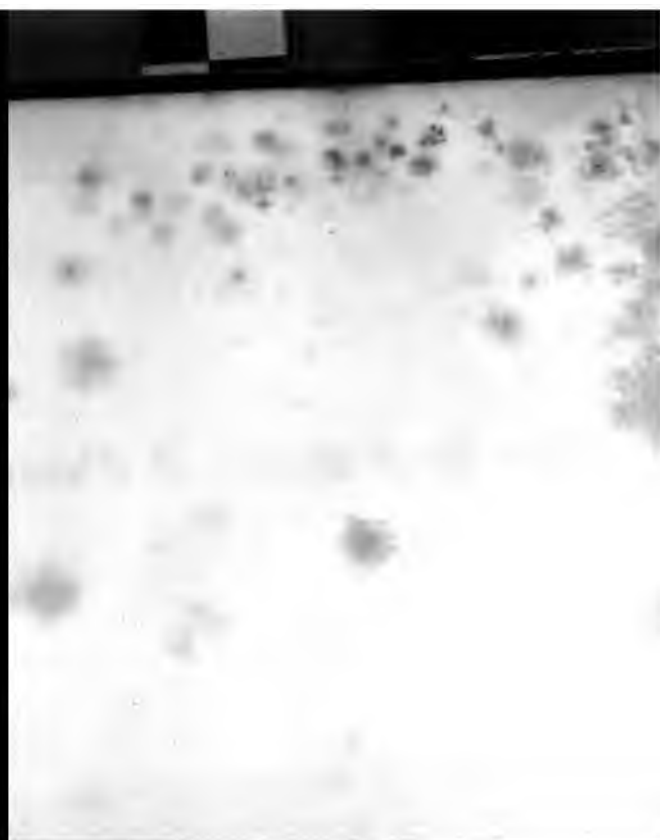
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THE

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PRACTICE

OF

The High Court of Chancery:

TO WHICH IS ADDED

A COLLECTION OF THE FORMS OF PLEADINGS AND OF
PROCEEDINGS IN THAT COURT.

BY JOHN NEWLAND,

OF THE INNER TEMPLE, ESQUIRE, BARRISTER AT LAW.

THE THIRD EDITION, WITH VERY CONSIDERABLE ADDITIONS.

IN TWO VOLUMES.

VOL. I.



LONDON:

SAUNDERS AND BENNING, LAW BOOKSELLERS,
(SUCCESSORS TO J. BUTTERWORTH AND SON,)
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MDCCCXXX.



TO THE
RIGHT HONOURABLE JOHN
LORD ELDON,
BARON ELDON,
OF ELDON IN THE COUNTY OF DURHAM,
LORD HIGH CHANCELLOR OF GREAT BRITAIN,
THIS WORK
IS,
WITH HIS LORDSHIP'S PERMISSION,
RESPECTFULLY INSCRIBED.

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TO THE

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A COMPENDIOUS Treatise on the Practice of the Court of Chancery is here offered to the Profession.

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THE Author presents to the Profession a new Edition of his Practice of the Court of Chancery, in which he has made very considerable Additions, consisting of the Cases on the subject of the Treatise decided since its first publication, and of other matter.

The Author has added a Volume, comprising the different Forms of Proceedings in the Court, commencing with the Bill; and pursuing, as far as possible, the same arrangement as is adopted in the first Volume.

THE PREFACE

TO THE

THIRD EDITION.

A THIRD Edition of this Work has become necessary, not only by the Second Edition, which was published in the year 1819, having been for some time out of print, but by the numerous decisions on the Practice of the Court since that period, and particularly by the New Orders in Chancery, published in April 1828, by which important alterations have been made in the Practice of the Court. The Author has interspersed them in the different parts of the Work to which they respectively relate. The Second Volume, which is devoted to Forms of Pleadings, and of different Processes, has been also in several material parts considerably augmented.

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332, read Jones v. ———.

† For "Parkhurst v. Lowten,"
331, read Kennedy v. Cassallis.

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after 6 insert 8.

(b) p. 125, for 2 read 1.
line 1, p. 127, for "plaintiff" read
party; and in same page, in (a) for 217,
read 92.

reference (b) p. 131, before 58, insert 1.

(a) p. 136, strike out 8, and
insert 5; and in (b) strike
out 8 and insert 6.

(c) p. 146, after "Lee v.
Ryder," insert 6 Mad.

(b) p. 147, for 2 read 1, and
strike out 0, and insert 6.

(b) p. 161, before "Cha. Ca.,"
insert 2; and for 1 read 2.

line 11, p. 164, read "disallowed" for
"allowed."

reference (d) p. 171, for 2 read 1.

(b) p. 180, after 1 P. W., read
720 for 78; and in (c) for
8 read 3.

(c) p. 191, for 3 read 5.

(a) p. 197, after "18 Ves.,"
for 401 read 484.

(c) p. 203, for 7 read 9.

(b) p. 203, for 596 read 569.

(c) p. 241, for Ves. read Madd.

(d) p. 247, before "Swanst."
insert 3.

(e) p. 251, for 351 read 350.

(e) p. 252, for 6 read 9, and
add 470.

(d) p. 253, for 6 read 0.

(a) p. 267, for 10 read 11.

set

Sw

(b) p.

(a) p

(c) p

(c) p

and

(c) p.

(a) p.

(b) p.

for

(a) p.

(d) p.

Atk

In line 8, p. 405, af

erase comma, an

In reference (c) p

(a) p.

read

(b) p.

(d) p.

(a) p.

171.

(c) p.

and

(d) p.

11 V

(b) p. 5

(c) p. 5

(g) p. 4

and i

read

(c) p. 6

369 n

(a) p. 6

THE
PRACTICE
OF THE
High Court of Chancery.

CHAPTER I.

OFFICERS OF THE HIGH COURT OF CHANCERY.

THE Court of Chancery possesses an ordinary and an extraordinary jurisdiction. In its former capacity it is a court of common law, and is called the petty bag side: in its latter, it is a court of equity, and proceeds according to equity and good conscience. It is the object of the present Treatise to state the rules of practice in the latter court.

The chief judge in this court is the Lord Chancellor, who sits alone, and is styled the Lord High Chancellor of Great Britain; he is invested with the office by the delivery to him by the King

... by prescrip
cedence of all temporal peers ;
at the King's pleasure, and the
resumption of the great seal de
of Chancellor.

It sometimes happens that, u
the Chancellorship, commission
by the Crown to execute the dut
They are usually three in num
lected from the judges in the co
law. The custody of the great s
to the care of the commissioner
cedence of the rest. By stat. 1 V
such commissioners may use and
every the same offices and auth
Lord Chancellor of right ought to
have and take place next after
realm and Speaker of the Hous
unless any of them happen to be

as such one commissioner, in the absence of the others, shall not make any decrees, or put the great seal to any thing whereunto the whole broad seal ought to be affixed, unless there be two commissioners.

In order that the business of the court may not be interrupted by the absence of the Lord Chancellor, from illness, or other cause, there is a commission addressed to the then puisne judges, and the then masters, authorising any three of them, of whom a judge is to be one, to transact the business of court. When the business of the court is despatched, under the authority of this commission, it is done by one judge and two masters, who sit with the judge, join in making the orders, and constitute a necessary part of the court. (a) Besides this provision in case of absence, the Lord Chancellor is entitled to call to his assistance on the bench any of the judges, as he shall think proper.

THE MASTER OF THE ROLLS.

The *Master of the Rolls* is another judicial officer in the Court of Chancery; he is appointed by the Crown by patent, and holds his office for

(a) See 1 Vern. 264. 1 Bro. C. C. 75.

life. He administers justice by himself in a separate court, called the Rolls. He has the power of hearing and determining originally the same matters as the Lord Chancellor, excepting cases in lunacy and bankruptcy; but all orders and decrees pronounced by the Master of the Rolls must be signed by the Lord Chancellor before they are enrolled. (a) The Master of the Rolls is also the chief of the twelve Masters in Chancery, and chief clerk in the petty bag office, and he is the keeper of all the records of the Court of Chancery, after the decrees and orders have been enrolled; and on that account he was anciently styled *Guardien des Rolles*. The Master of the Rolls ranks immediately after the Chief Justice of the King's Bench. His salary, by the late statute of 6 Geo. IV. c. 84, is 7,000*l.* a year.

It may be proper here to mention, that the act of 6 Geo. IV. cap. 93, recites that, by divers letters patent, during the reign of Geo. III., and also since his decease, certain of the Justices of the King's Bench and Common Pleas, and of the Barons of the Exchequer, and others associated with them, had been empowered, in the absence of the Chancellor, to hear and determine all matters depending in Chancery; and the act further recites, that such commissions were founded upon

(a) *Vide* 3 Geo. II. c. 30.

ancient and continued usage ; and that divers of the justices and others, assigned by the said commissions to determine the matters aforesaid, have, in conformity with the usages, &c., under similar commissions, &c., sat at the Rolls during the illness, &c. of the Master of the Rolls, and determined matters set down to be heard at the Rolls ; and the act further recites, that it had been doubted whether such justices, &c. had power, under such commissions, to determine any such matters. The act then enacts that all decrees, during the reign of Geo. III., and of his present Majesty, pronounced at the Rolls, in the absence of the Master of the Rolls, in the supposed exercise of any of the powers aforesaid, shall have the same validity as if they had been pronounced by the Master of the Rolls.

THE VICE CHANCELLOR.

The office of *Vice Chancellor* was created by statute 53 Geo. III. cap. 24 ; he is appointed by the Crown, by letters patent ; and he must be a barrister, of fifteen years' standing at the least ; and he is styled the Vice Chancellor of England, and holds his office during good behaviour. He has power to hear and determine all causes, matters, and things depending in the Court of Chancery in England, either as a court of law or as a

court of equity, or as incident to any ministerial office of the said court, or which have been, or shall be submitted to the jurisdiction of such court, or of the Lord Chancellor, &c. for the time being, by the special authority of an act of parliament, as the Lord Chancellor, &c. shall from time to time direct; but no decree or order of the Vice Chancellor shall be enrolled until the same shall be signed by the Lord Chancellor, &c. and the Vice Chancellor has no power or authority to discharge or alter any decree or order made by the Lord Chancellor, &c. unless authorised by the Lord Chancellor, &c.; nor any power or authority to discharge or alter any decree or order made by the Master of the Rolls.

It is doubtful whether the Vice Chancellor can, even with the consent of parties, discharge or alter an order by the Lord Chancellor; but if the Vice Chancellor is authorised to *discharge* an order of the Lord Chancellor, he is not thereby authorised to alter it. (a) And if the Master of the Rolls make the common order, that the plaintiff should be at liberty to amend his bill; the Vice Chancellor has no power to discharge that order in default of the plaintiff not amending it within a given time. (b)

(a) *Saunders v. King*, 2 Jac. and Walk. 429.

(b) — *v. Hickman*, 1 Sim. and Stu. 104.

It is further provided by the above act, that the Vice Chancellor shall sit for the Lord Chancellor, &c. whenever his Lordship shall require him so to do, and shall also at such other times as the Lord Chancellor, &c. shall direct, sit in a separate court, whether the Lord Chancellor, &c. or the Master of the Rolls, shall be sitting or not. The Vice Chancellor has rank and precedence next to the Master of the Rolls, and his salary is now, by the late statute of 6 Geo. IV. c. 84. 6,000*l.* a year, and he is not to take any fee or reward whatsoever over and above his salary, for or in respect of any business done by him as Vice Chancellor.

MASTERS IN CHANCERY. (a)

There are eleven Masters in Chancery besides the Master of the Rolls, who is the chief of them. They are appointed by the Lord Chancellor, and hold their offices for life. It is the duty of the Masters to execute the orders of the Court of Chancery, upon references made to them by the court, acting either in exercise of its original juris-

(a) The author is much indebted for the account here given of the officers of the Court of Chancery, to the Report of the Commissioners for examining into the duties, salaries, and emoluments of the officers of the several courts of justice, the Report in question being as to the Court of Chancery.

...to specify every head or reference
they are almost as numerous as the
subject to the jurisdiction of the court
allowing is a statement of such as may
occur. To examine into any allegation
or scandal in any bill or answer, an
efficiency of any answer or examination
into the regularity of proceedings
and into all alleged contempts of
settle interrogatories for the examina-
tions ; to take the accounts of execu-
tors, trustees, and guardians, and
ties of every description ; to inquire
side upon, the claims of creditors and
next of kin ; to appoint receivers of
tates, and of the rents of real estate
salaries, and examine their accounts
as to repairs to be done, and into the
following items :

dying intestate ; to appoint guardians of the persons and estates of infants, and to allow proper sums for their maintenance and education ; to appoint committees of the persons and estates of lunatics, and to examine the accounts of such committees ; to tax the costs of the proceedings in any suit, or under the orders of the court, and also the bills of costs of solicitors, delivered to their clients, and referred for taxation under the statute of 2 Geo. II. c. 23 ; to inquire whether infants are trustees or mortgagees within the statute 7 Anne, c. 19 ; to inquire under the statute 39 Geo. III. c. 56, into the interest of parties in money, subject to be laid out in the purchase of lands. In general, there is no question of law or equity, or disputed fact, which a Master may not have occasion to decide, or respecting which he may not be called upon to report his opinion to the court.

The Masters have also the custody of such title-deeds and original instruments as the court thinks fit to place under their care, for the security and benefit of the parties interested therein.

The Masters attend the Lord Chancellor and Master of the Rolls at the sitting of the court, according to an ascertained rotation, take their seats upon the bench, and remain there until they are permitted to retire, which is usually soon after the

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sitting, that they may attend to the business of their respective offices.

Two Masters attend the House of Peers every day it sits, and are employed by that house in carrying their messages to the House of Commons, except such as relate to the royal family, which are usually carried by the judges ; such Masters as are members of the House of Commons do not join in executing this duty. On the trial of a peer, or of any person impeached by the Commons, all the Masters attend every day. The Masters also attend coronations and processions of state.

For the convenience of the suitors and others, one Master attends every day at the public office for the purpose of taking answers and affidavits, the acknowledgment of deeds, recognizances, and surrenders of offices intended to be enrolled, and other business of that kind, according to the stat. 13 Car. II. st. 1.

When a person is unable, from sickness, or any other cause, to come to the public office, the Master attends such person at any distance from London, not exceeding twenty miles.

Each Master executes the orders of reference made to himself independently of all the other Masters.

The hours of attendance, in the Masters' office, are from 10 o'clock in the morning until 3 in the afternoon, and from 6 to 8 in the evening. (a) The hours of attendance in the public office are particularly stated hereafter in that part which respects the clerk of this office.

The holidays kept at the Masters' office consist of the four vacations, viz. from the last seal after each term to the first seal before the following term; and, besides these vacations, the following particular holidays are kept in the private offices, namely, King Charles's Martyrdom, Candlemas day, Lady day, Ascension day, the Restoration of King Charles II., Midsummer day, and the Gunpowder Plot. The holidays kept in the public office are specified in that part of this chapter which respects the clerk of the public office.

Though the vacations are understood to consist of the periods before stated, the Masters attend in their offices for the accommodation of the suitors, as long after the last seal subsequent to each term, as they in their discretion may think necessary for completing or forwarding the business in their respective offices; and with that view they have at-

(a) But the evening attendance is now seldom given.

in the exchequer, under a grant in
subject to the usual deductions of
amounting to about 6*l.* 8*s.* 10*d.* each
the clerk of the hanaper, of two *s.*
and 400*l.*, making, together, 600*l.* a
paid out of the dividends of public a
chased by the Court of Chancery unde
rity of Parliament. These salaries
by the stat. 5 Geo. III. c. 28, and
c. 128. They are also entitled to
fees for business done in their
offices.

CLERKS OF THE MASTERS IN ORI

There are attached to each office
one is the chief clerk, the other is
clerk of the court.

deeds, books, and other documents in the office, so that they may at all times be readily found and produced when wanted ; to attend the court with deeds, books, and papers ; to draw and transcribe all certificates to be signed by the Master, and to draw and transcribe all reports to be afterwards settled and signed by the Master, and to prepare the schedules to be annexed to the reports. They are also employed in assisting the Masters in making calculations. No clerk belonging to any of the Masters, or to either of the examiners, are allowed to solicit any cause in Chancery. (a)

CLERK OF THE PUBLIC OFFICE OF THE MASTERS IN
ORDINARY.

It has been already stated, that one Master is in attendance during the whole year, (certain holidays excepted,) in order to administer oaths to answers and pleas, to take affidavits, to receive the acknowledgments of recognizances, deeds, and specifications of patents, and to transact other business of that kind. For the despatch of this business, they have an office common to all the Masters in rotation, called the public office, and a clerk attached to that office, called the clerk of the public office. This office was established by

(a) Beam. Cha. Ord. 306.

the stat. 13 Car. II. st. 1. The duties of the clerk are to write the jurats and attestations upon honour to answers and pleas, and the returns to commissions, and to enter a memorandum of them in a book, kept for that purpose in the office, and to preserve such records until the clerk in court, who is to file them, applies and gives a receipt for them; to write the certificate of witnesses being sworn, who are to be examined by the examiners, or before arbitrators; to write the jurats on affidavits, and the memoranda on affirmations; to make out the rotas for the Masters respecting all their different attendances in the public office, in court, at the Rolls, and in the House of Lords; and to deliver these lists, not only to the Masters, but to the deputy registers, as their guide in filling up the references to the respective Masters; to keep lists of all causes and petitions in the papers before the Lord Chancellor, Master of the Rolls, and Vice Chancellor; and to enter the names of the consent causes and petitions in a book. Generally, he is the clerk in all matters transacted in the public office, and which regard the Masters as a body.

One Master, and the clerk of the public office, attend there every day during the whole year, Sundays, the holidays, and the Saturdays after mentioned, only excepted, viz. New Year's day, Epiphany, King Charles's Martyrdom, Candlemas

day, Lady day, Good Friday, the Saturday following, and Monday, Tuesday, and Wednesday, in Easter week, Ascension day, Monday, Tuesday, and Wednesday in Whitsun week, King Charles's Restoration, Midsummer day, Saint Matthew, the King's Coronation, Michaelmas day, King's Accession, Powder Plot, Christmas day, and the two following days. The hours of attendance are as follow :—From New Year's day to the day immediately preceding the first seal before Hilary term, from eleven to one, except Saturdays, when the office is shut ; on the day preceding such seal from ten till two, and from six until eight in the evening ; the two following days from ten until two only : and from thence, until Saturday after the last seal after Hilary term, from ten until two, and six until eight, except the Saturday evenings before and after term ; Passion week, from ten till two ; Easter week from eleven until one ; from the first seal before Easter term until the Saturday after Easter term, the same hours of attendance as Hilary term ; from the seal before Trinity term until the Saturday after the last seal after Trinity term, the same hours of attendance as the preceding terms ; from thence, to the conclusion of the sittings in court, from ten till two only ; from the conclusion of the sittings until the first seal before Michaelmas term, from eleven till one, except on Saturdays, when the office is shut ; before, during, and after Michaelmas term, the same at-

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tendance as before, during and after the other terms. The hours of attendance just mentioned are of course to be understood, with the exceptions to be collected from the list of holidays.

MASTERS EXTRAORDINARY IN CHANCERY.

To assist the Masters in Chancery in the ministerial part of their duty, officers (called the Masters Extraordinary in Chancery) are appointed by the Lord Chancellor. Their principal business consists in taking affidavits, and the acknowledgments of deeds in the country, and they are restrained from doing any thing within twenty miles of London ; and that it may appear whether they do or not, they are in the caption to express the name of the town and county where they shall take any affidavits, &c., and also to certify the time when they were taken, otherwise the same shall not be held authentic, nor admitted to be filed or enrolled. (a)

THE ACCOUNTANT GENERAL.

The Accountant General is a new officer created by the **act** of 12 Geo. I. c. 32, and stands in the

(a) Beam. Cha. Ord. 48, 212.

place of the Masters and Usher of the court. The above act recites two orders of the Court of Chancery, the one bearing date the 26th of May, 1725, and the other bearing date the 4th day of November following, by which the duties of the Masters and Ushers, with respect to the money of the suitors vested in them, were prescribed. The above act then enacts that the above two orders shall be confirmed; and, further, that there shall be one person appointed by the Court of Chancery to perform all such matters relating to the delivery of the suitor's money and effects into the bank, and taking them out of the bank, and the keeping the accounts with the bank, and all other matters relating thereto, as by the said orders are prescribed to be done by the Master and Usher; such officer to be called the Accountant General of the Court of Chancery, and to hold his office during the pleasure of the court.

The Governor and Company of the Bank of England have the general custody of the effects of the suitors of the Court of Chancery, as the bankers of the court, subject to the orders of the court. These effects consist of cash, stocks, exchequer bills, India bonds, shares in public companies, and specific articles deposited: all these effects are placed in the bank in the name of the Accountant General.

The Accountant General does not receive any of the money or effects of the suitors of the court ; but they are placed in the Bank of England in his name, and he keeps an account with the bank, according to the several causes and accounts to which such money and effects severally belong. The dividends and interests of the several stocks, India bonds, and other securities, are received by the bank, as they become due, under a power of attorney, from the Accountant General, and placed to the credit of the causes and accounts to which they respectively belong ; the bank sends quarterly to the Accountant General's office a book, called the dividend book, signed by an officer of the bank, which book, containing the amount of the securities and interest money belonging to each cause and account, is countersigned by the Accountant General, and sent into the report office. For each sum of money to be received by the bank, the Accountant General signs a certificate, mentioning the order, report, or act of parliament under the authority of which the person named in the certificate is to pay the sum therein specified, and directing it to be placed to his account, as Accountant General, to the credit of the particular cause or account mentioned. When the party paying in the money, or his solicitor, brings into the Accountant General's office a certificate from the bank of such payment having been made, the

Accountant General signs another certificate of such payment, and annexes it to the bank certificate, for the purpose of being entered in the report office.

For each sum of stock directed by any order of the court to be transferred into the name of the Accountant General, application is made to the first clerk in the office for a ticket or notification, specifying the amount of the stock to be transferred, and the cause or account to which it is to be placed when such transfer is made ; the Accountant General accepts the stock, and signs a certificate to the bank of his having made such acceptance ; of this transfer of stock there is a certificate sent from the bank, or such other office where the stock may be, to the Accountant General's office ; and the Accountant General signs another certificate of such transfer, and of his acceptance of the stock, and annexes it to the certificate from the bank, or such other office where the stock may be, for the purpose of being entered in the report office.

For each parcel of exchequer bills, or India bonds, and for each package containing specific articles directed by any order of the court, to be deposited in the bank in the name of the Accountant General, he signs a direction for the person named in such order, to make such deposit in

the bank in his name, and to what cause or account it is to be placed. When the party, or his solicitor, brings into the Accountant General's office a certificate from the bank that such deposit has been made, the Accountant General signs another certificate, that such deposit has been made into the bank, and annexes it to the bank certificate, for the purpose of being entered in the report office.

For each sum of money directed to be paid out under any order, the Accountant General draws on the bank by a note, under his hand, entitled in the particular cause or account out of which the money is to be paid; this note is entered at the report office, and marked and countersigned by one of the deputy registers of the court; if the money, for which such note is drawn is not for interest or maintenance, the Accountant General signs a certificate of such note, which certificate is filed in the report office.

For each sum of money directed to be laid out in the purchase of stock, exchequer bills, or India bonds, the Accountant General draws on the bank in the particular cause or account by a note under his hand for the amount of such sum. This note is also entered in the report office, and marked and countersigned by one of the deputy registers of the court. If the money, for which such note

is drawn, is principal money, the Accountant General signs a certificate of such note, which certificate is filed in the report office. If the purchase for which this note is drawn should be stock, the Accountant General accepts such stock by signing his name in the transfer book at the bank, or at any other office where such stock may be ; and then signs a certificate to the bank of his acceptance of such stock, in such particular cause or account. The bank also sends to the Accountant General's office a certificate that the transfer of such stock has been made ; and the Accountant General signs another certificate of the particulars of such purchase, transfer, and acceptance of stock, and annexes it to the bank certificate, for the purpose of being entered in the report office. If the purchase for which the note is drawn should be exchequer bills, or India bonds, the bank sends to the Accountant General's office a certificate of such exchequer bills, or India bonds, having been purchased and deposited in the particular cause or account mentioned in the note, and the Accountant General signs another certificate of the particulars of such purchase and deposit, and annexes it to the bank certificate for the purpose of being filed in the report office.

When any sum of stock is by any order directed to be transferred, or when any sum of stock, or any exchequer bills, or India bonds are, by any order, directed to be sold ; or when any exchequer

bills, India bonds, or specific articles in packages are, by any order, directed to be delivered out, the party, or his solicitor, brings to the Accountant General's office a certificate, from one of the deputy registers of the court, of what stock is to be transferred, and to whom; and of the stock, bills, or bonds to be sold, and to what amount; of the bills, bonds, or specific things in packages to be delivered out, and to whom, and from what cause or account. In transfers of stock, the Accountant General signs, and sends to the bank a certificate of his having made such transfer, and of the cause or account from which the same is made, and then signs another certificate of such transfer to be filed in the report office. In sales of stock the Accountant General signs a certificate to the bank, of the stock sold, and the money raised in the particular cause or account. On sales of exchequer bills, or India bonds, the deputy register's certificate is countersigned by the Accountant General, who, after having received from the bank a certificate of the particular bills or bonds sold, the amount of the money raised, and the cause or account in which the sale is made, signs another certificate of the particulars of such sale, and annexes it to the bank certificate, to be filed in the report office. When exchequer bills, and such other things as before-mentioned, are delivered out, the deputy register's certificate is countersigned by the Accountant General, and sent to the bank; and the bank having sent to

the Accountant General a certificate of the particulars of such bills, and other things, delivered out, and to whom, and from what cause or account, the Accountant General signs another certificate of such delivery, and annexes it to the bank certificate to be filed in the report office. Where a power of attorney is to be executed abroad, empowering another to receive exchequer bills and cash from the Accountant General, it is to be executed in the presence of a notary public, who is to affix his official seal; and the chief magistrate of the place is to certify that the person subscribing himself a notary public is one, and the chief magistrate affixes his official seal. But upon a certificate that the French law did not appoint any magistrate for that purpose, a power of attorney executed at Paris, in the presence of two witnesses, authenticated by a notary at Paris, and an affidavit here, verifying the signature of the notary, was ordered to be acted upon by the Accountant General. (a) But an affidavit of the execution of an instrument before the mayor of a foreign city, will not be received without evidence of his holding that situation. (b) And it may be proper to add, that where an order is made to pay in a specific sum, the Accountant General will not receive a less sum than the whole; and for the

(a) *Lord Kinnard v. Lady Saltoun*, 1 *Mad.* 227.

(b) *Hutcheon v. Manning*, 6 *Ves.* 623.

quests that the principal and interest on the bills may be received, or that the exchange may be exchanged; then the Accountant General signs a direction to the bank for the money and interest due on such bills to be received and paid into the bank in such manner that the exchequer bills received in exchange may be deposited there in his name, and to what cause or account to which such bills, when raised upon them, belong: the bank then issues a certificate to the Accountant General that his directions have been complied with, and the Accountant General signs another certificate that the bills have been exchanged, and the principal and interest have been received on them, and annexes it to the bank certificate for the purpose of being filed in the repository.

cash or stock in a particular cause or account to be carried over to some other cause or account, mentioning the order, under the authority of which such carrying over is directed; the bank then sends a certificate to the Accountant General's office of such carrying over having been made; the Accountant General then signs another certificate of such carrying over, which is annexed to the bank certificate, for the purpose of being filed in the report office. Some of the before-mentioned operations take place on almost every day when the office is open. And, with respect to the mode in which creditors, in a creditors' suit, obtain payment of the sums reported due to them, it may be useful to state, that it is as follows:—The order and the office copy of the report are presented to the Accountant General; he examines the report, to see who are the creditors to whom the Master has found debts to be due, and what sums he has reported to be owing to each. He then draws cheques for the several sums, and writes his initials on the margin of the report, opposite the sums, to indicate that such cheques have been drawn. Afterwards, the cheque, together with the order and the office copy of the report, are carried to the registrar, who seeing, by the initials of the Accountant General, that cheques have been drawn for such and such sums, compares the cheque, which is presented to him, with the order and report, in order

countant General. A very considerable number of such certificates are usually required in the course of a year.

The Accountant General attends two or three days, and often four or five days in a week, at the Bank of England, and other places, for the purpose of making sales, transfers, and acceptances of stock, according to the orders of the court. He also attends, in his turn, as a Master in ordinary, at the public office, for the purpose of discharging the same duties as the other Masters in ordinary discharge when they attend there. The hours of attendance at the Accountant General's office are from nine in the morning till two in the afternoon, and from four in the afternoon till seven in the evening.

The holidays are King Charles's Martyrdom, Candlemas day, Lady day, Ascension day, King Charles's Restoration, Midsummer day, Powder Plot, Lord Mayor's day, the Birthdays of the King, Queen, and Prince of Wales ; at Christmas, from Christmas eve to the 7th of January ; at Easter, from the day before Good Friday to the Monday after Easter week ; and at Whitsuntide, the whole of the Whitsun week. In what is called the long vacation the office is shut by an order of the court, usually from the latter end of August, or the beginning of September, to the first general

REGISTER OFFICE.

The office of the register of the cery is executed by four sub or d. besides the master or clerk of th sometimes called the filer of the r two clerks of the entries. The offi register is vacant, and the ab officers receive for their own use th ness done in the office.

DEPUTY REGISTERS.

The four deputies attend the co ting: take minutes of the "

Geo. I. cap. 32, it is the duty of the deputy registers to countersign the Accountant General's drafts upon the Bank of England ; and to draw and sign certificates to the Accountant General, preparatory to the transfer or delivery out of the stocks, securities or other property, standing in his name, or deposited in the bank in trust, in the several causes or accounts in the court, pursuant to the orders of the court for such purpose. For these duties no fees are taken or allowed to be taken by the deputy registers. The senior deputy register appears in practice to discharge certain special duties of the office himself. He files exceptions to the Master's reports, enters pleas, demurrers, causes, appeals, rehearings, further directions, equities reserved, and exceptions for hearing before the Lord Chancellor, and makes out a book of the same ; he delivers notes for subpœnas to hear judgment ; he makes out a paper of causes and other matters, to be heard in court, and notices, causes, and other matters that are adjourned, and sees that they are put into the paper the day they are adjourned to ; he makes copies of exceptions, and petitions, for rehearing, and of appeal when required ; he receives deposits upon filing of exceptions and bills of review, and also, upon setting down petitions for rehearing and of appeal, keeps an account thereof, and pays the same pursuant to the orders of the court ; he also marks with the office stamp printed copies of briefs, and let-

ters patent, and tells out and tells in the same ; he sets down as a privilege eight causes in each term. The next senior deputy register attends at the rolls, and has the like duties, excepting as to filing exceptions, and receiving the deposits thereon, and making copies thereof, marking and telling out and telling in briefs, and excepting also that his privilege extends only to the setting down of six causes in each term.

The hours of attendance at the office are generally from ten in the morning till two in the afternoon, and from five till eight in the evening. But from the time of meeting, after the Christmas holidays, to the first day of Hilary term, from the last seal after Hilary term to the first day after Easter term, from the last day of Easter term to the first day of Trinity term, and from the first seal before Michaelmas term to the first day of the same term, the hours are from ten in the morning till three in the afternoon, and from the fourth seal after Trinity term till the shutting of the Accountant General's office, the hours are from ten in the morning till two in the afternoon, and from five till six in the evening. When an increase of business renders it necessary, further attendance is given.

The holidays are, Martyrdom, Candlemas day, Lady day, Ascension day, Restoration, Midsum-

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The holidays are, Martyrdom, Candlemas day, Lady day, Ascension day, Restoration, Midsum-

mer day, King's Birthday, from Maunday Thursday till the Monday after Easter week, the Whitsun week, Ash Wednesday, Gunpowder Plot, (but if the court sits on either of these two days, attendance is given from ten till one,) Queen's Birthday, Prince of Wales's Birthday, Lord Mayor's day, Saint Thomas. Attendance on these days is given from ten till one; twelve days at Christmas: the long vacation commencing when the Accountant General's office is shut, and ending at the first seal before Michaelmas term. But some person is in attendance during the long vacation, excepting on the days above noted as holidays.

REGISTER'S BAG-BEARER.

The duty of the bag-bearer is to attend the Court of Chancery at all times, when the Lord Chancellor, or Vice Chancellor, is sitting, with the register's book and cause papers, and to continue his attendance till the rising of the court; after which he makes out from the register's paper the several lists of causes and other matters, appointed for hearing on the following day, and delivers the same, in the evening preceding, at the houses of the Lord Chancellor and Vice Chancellor, at certain public offices, and at the chambers of gentlemen of the bar.

MASTER, OR CLERK, OF THE REPORT OFFICE.

The duties of the master of the report office are divisible into three heads: 1. What relate to reports or certificates. 2. What relate to rules, orders, and decrees. 3. What relate to the effects of the suitors of the court. 1. What relate to reports or certificates. He is to receive, file, and keep all reports and certificates, made by the Masters and the Accountant General, his office being the place where the originals are deposited, and where office copies are made. 2. What relate to rules, orders, and decrees. He receives on the first day of Michaelmas term, in every year, from the clerks of the entries, all the decrees, orders, and rules, entered in the course of the preceding year, makes indexes to them, and binds them in volumes, to be resorted to as occasion requires. He makes copies of such decrees, orders, and rules, when required; and he has the custody of the old books, containing decrees, orders, and rules, from the reign of King Henry VIII. inclusively. 3. What relate to the effects of the suitors of the court. His duties under this head were imposed by the stat. 12 Geo. I. cap. 32, by which he is required to keep an account of all monies, funds, and effects, belonging to the suitors of the court, one account being kept at the Bank of England, another by the Accountant

General, and a third at the report office, which three accounts are, in the months of September and October of each year, compared and balanced with each other.

The hours of attendance are, for the report side of the office, from ten in the morning till two in the afternoon, and from five till eight in the evening. On the account side from ten in the morning till three in the afternoon, and from five till seven in the evening. The office is open every day, excepting for twelve days at Christmas, for eight days at Easter, and during the Whitsun week.

REGISTER OF AFFIDAVITS.

The duties of this officer are to receive, register, and file all affidavits made in causes and other proceedings, in the Court of Chancery, to be originally used in that court, and to make copies thereof. It is also his duty, when required, to attend with the original affidavits in the Court of Chancery, to grant certificates of affidavits being filed, and to search for affidavits. The office is executed by a deputy, who is wholly paid by his principal. The hours of attendance at this office are from ten in the morning till two in the afternoon, and from five till eight in the evening ;

but no candles are lighted therein, from the last seal after Hilary term till the first seal before Easter term; nor from the last seal after Michaelmas term to the first seal before Hilary term. The holidays are, New-year's day, Twelfth day, King Charles's Martyrdom, Candlemas day, Good Friday, Easter Monday, and the two following days; Holy Thursday, Whit Monday, and the two following days; his Majesty's Birthday, Midsummer day, Michaelmas day, the King's Coronation, the King's Accession, the Gunpowder Plot, Christmas day, and the three following days.

EXAMINERS.

The duties of this office are executed by two examiners, assisted by copying clerks, who respectively take an oath of office. The duties of the examiners are, to receive all interrogatories, for the examination and cross-examination of witnesses, in any cause in the Court of Chancery, and to examine and cross-examine such witnesses; to prepare the depositions of such witnesses in writing, and to read over such depositions to the witnesses previously to their signing the same, or in person to examine witnesses; to hold witnesses to the points interrogated to; (a) to

(a) Beam. Cha. Ord. 188.

certify in writing the different documents deposited to by the witnesses on their examination; to sign notices for the attendance of witnesses to be served with *subpœnas*; to grant certificates that interrogatories are or are not filed, and that witnesses have or have not attended for examination, and such other certificates as occasion may require. They may take out *subpœnas* against persons unduly making copies of depositions, to examine them. (a) It is also their duty to preserve the records of the office; and to attend the Lord Chancellor, Master of the Rolls, Vice Chancellor, and Masters in Chancery, and any other court or place in town or country, with the records, when duly required so to do.

By the stat. 50 Geo. III. cap. 164, in case it should appear to the Lord Chancellor, &c., and to the Master of the Rolls, for the time being, that the business in the examiner's office shall at any time increase, so that the same cannot be done conveniently by the two examiners, a power is given to the Lord Chancellor, &c., to make an order that other and not exceeding two more examiners, and two more clerks of such examiner, shall be provided; and the Master of the Rolls is empowered, upon such order being made, to

(a) Beam. Cha. Ord. 131.

licable, be examined by different such manner, and under and subject and regulations, as the court shall order respecting the same. By this act likewise a power is given to the Lord Chancellor, and the Master of the Rolls, to regulate the hours of attendance of the examiners and clerks in the offices provided for the duties of the examiners and clerks, the distribution of the business of the court, and also the fees and emoluments which the examiners and their clerks shall be entitled to receive from the suitors. The powers given to the Lord Chancellor by this act, have been exercised by a warrant under the great seal of Great Britain, by the court, the 19th July, 1810, and confirmed by the court, the 19th July, 1811. (a)

The hours of attendance at this court

morning until three in the afternoon. With respect to the holidays observed at the office of the examiners, the author refers the reader to *Beam. Cha. Ord.* 479.

SIX CLERKS.

These officers are appointed by the Master of the Rolls, and hold their offices on the equity side of the court. Their duties are to receive and file all bills, answers, replications, and other records, in all causes, on the equity side of the Court of Chancery; and if, when brought to them for that purpose, they appear to be fairly engrossed with their proper stamps, and conformable to the rules and practice of the court, to enter memoranda of them in books, from which they are to certify to the court, as occasion may require, the state of the proceedings in causes. They sign all copies of pleadings, made by the sworn clerks, and waiting clerks, after seeing that the originals are regularly filed. As their signature is affixed merely as a certificate that the original is filed, they are not responsible for the correctness of the office copies. (a) After each term, they present, to be set down, the causes, ready for hearing in the ensuing term, either before the Lord

(a) *Brown v. Barnard*, Jac. 57.

Chancellor, or the Master of the Rolls. They attend in Westminster Hall in term time, to read the documents required to be read in causes. An instance has occurred where the court imposed a fine on five out of the six clerks for not attending ; probably in a cause where they were ordered to attend. (a) They examine and sign dockets of decrees, and dismissions, prepared for enrolment, and see that the records and orders be duly filed and entered, which they certify previously to the presentation of the dockets to the Lord Chancellor, the Master of the Rolls, or the Vice Chancellor, for signature. They have the care of all records in their office, which remain in their studies for the space of six terms, for the sworn clerks and waiting clerks to resort to without fee. They afterwards sort them, and lay them up in their record room in bundles, making indexes and calendars, for the more ready recourse to them. The remaining business in their office, on the equity side of the court, is transacted by the sworn clerks and waiting clerks. Instead of each six clerk employing a deputy under him, (as was formerly the practice,) to transact his business during the vacation, and to take care of the records in his particular division, the six clerks now employ one clerk under them all, for the care of the records in every division, whereby the disturbance of the records, which is stated to

(a) Beam. Cha. Ord. 119.

have taken place under the more ancient practice, appears to be prevented. One or more of the six clerks, as the business of the office requires, attends in person during vacations. In addition to the duties on the equity side of the court, the six clerks have other duties, with which the sworn clerks and waiting clerks have no concern. They are comptrollers of the hanaper: and enrol the warrants for grants, which pass the great seal. The six clerks also write and engross letters patent for sheriffs, with the writs incident thereto; and they have the custody of the sheriffs' roll. An under clerk assists his principals in the preparation of sheriffs' patents, and in other parts of their duties. The six clerks are the nominal attorneys in all causes depending in the petty bag; and it is their duty to enter in a book all rules in causes given by the clerks of the petty bag.

The usual hours of attendance are from ten in the forenoon till two in the afternoon, and later, as occasion requires, and in term time from six to eight in the evening. The holidays are, the Epiphany, King Charles's Martyrdom, the Purification, Lady day, unless the court sits; Ash Wednesday, Good Friday, Easter week, excepting Saturday, if it be a notice day; Ascension day, the Restoration, Whitsun week, excepting Saturday, if it be a notice day; King's Birthday, Midsummer day, unless the court sits, or it

Officers of the Court of Chancery.

notice day ; Prince of Wales's Birthday, St. Bartholomew, London burnt (2nd of September), Coronation, St. Michael, Accession, Powder Plot, and Mayor's day, Christmas day, and intervening days to 6th of January.

SWORN AND WAITING CLERKS.—SWORN CLERKS.

These officers are admitted to their office by the Master of the Rolls, and which they hold for their lives. (a) It is the duty of the sworn clerks to make out all writs, special and common, on the equity side of the Court of Chancery, and all processes (excepting sub-

as occasion requires. They enter all rules to produce witnesses, and pass publication, and all appearances and consents, with the register, and sign all petitions for rehearing and of appeal, undertaking, on behalf of their respective clients, to pay such costs (if any) as the court shall award, as to any proceedings had since the decree, or order appealed from, or sought to be reheard. They are, when required, to attend the hearing of causes wherein they are concerned, and also to attend the Masters in Chancery on the taxation of bills of costs, and otherwise, as occasion may require. And, by the 37th order of the general orders of 1828, the sworn clerks of the court, and the waiting clerks, shall not be entitled to receive any fees for attendance in court, except in cases where they shall actually attend, and where their attendance shall be necessary. They must be well acquainted with the fees of all officers on the equity side of the court; they draw and enrol all the dockets of decrees and dismissions required to be enrolled, (a) and exemplify the pleadings and proceedings of the court when required; they attend the Court of Chancery, and the Masters, and also the courts of common law, and assizes, with records, when required, pursuant to the orders of the Court of Chancery; they certify to the court matters of practice when required; they answer

(a) See Beames' Cha. Ord. 68.

Officers of the Court of Chancery.

questions stated by solicitors, or suitors, relative to the practice of the court, and give advice on the conduct of suits. And, by the 43d of the general orders of 1828, for the purpose of enabling persons to obtain precise information as to the state of any cause, and to take the means of preventing improper delay in the progress thereof, the clerk in court shall, at the request of any person, whether a party or not in the suit or matter required after, procure and furnish a certificate from the six clerks' office, specifying therein the names and general description of the several proceedings which have been taken in any cause in said office, whether such clerk in court be or

client, but only have given credit for them. They are the attorneys on the equity side of the court, and have a right to act as solicitors in it; and by themselves, or their agents, are to give constant attendance for the despatch of the suitors' business. It is in the option of a solicitor to employ any one of the sworn clerks he thinks proper. But it seems that a clerk in court cannot be changed at the pleasure of the solicitor. (a) If a party's clerk in court be dead, no proceedings can be had in the cause till he has appointed a new clerk in court, and a *subpœna ad faciendum attornat.* must be taken out for that purpose. (b) In order to qualify and entitle a person to act as sworn clerk, it is necessary that he should have served a clerkship of five years to one of the sworn clerks, who takes a fee in consideration of the same; after the expiration of which clerkship such person is qualified to be sworn in before the Master of the Rolls. (c)

For greater convenience, some alterations have been made in recent times as to the hours for transacting business. That part of the six clerks' office wherein the sworn clerks transact their business, is now open, during term time, from ten in the

(a) 2 Ves. 112.

(b) *Ratcliffe v. Roper*, 1 P. W. 419.

(c) Note: as to the different

orders by which the number of these officers was varied from time to time, see Beames' Ch. Ord. 164, in note.

Officers of the Court of Chancery.

ning till three in the afternoon ; and from six
eight in the evening, holidays excepted ; and,
n the last day of every term, until the second
after Hilary term, the seal after Easter term,
the fourth seal after Trinity and Michaelmas
ns, this part of the office is open from ten in
morning till four in the afternoon, excepting
the days appropriated for services of notices
motions and petitions, when it is opened from
in the morning until three in the afternoon ;
from six till eight in the evening ; and from
second seal after Hilary term to the last seal
of the same term ; and from the first seal be-
each term to the first day of each term, from

notice day, it is kept in the afternoon only; Midsummer day, unless the court sits, or it be a notice day; Prince of Wales's Birthday, Saint Bartholomew, September 2, (London burnt,) Coronation, Saint Michael, Accession, Powder Plot, Lord Mayor's day, in the afternoon only; December the 25th to January the 6th, both days inclusive.

WAITING CLERKS.

The service, attendance, and fees, of the waiting clerks are the same, in all respects, as those of the sworn clerks; nor do they differ, in any thing, from the sworn clerks, excepting that a clerk who has served but three years to a sworn clerk, may be admitted into the office of a waiting clerk; and that a waiting clerk has no right to take any articulated clerk under him; and that two waiting clerks are allowed to one seat in the six clerks' office, whereas the sworn clerks have, each of them, a separate seat.

KEEPER OF THE RECORDS IN THE TOWER.

The duty of this officer is carefully to preserve the rolls and records in the Tower of London; to attend at the record office, by himself, or his

The hours of attendance at t
in the Tower, are from ten in
three in the afternoon, excepti
The holidays are, the King's an
days, the King's Coronation an
30th of January, the 25th of Mar
three days at Easter, three days
29th of May, 24th of June, 29th
and three days at Christmas.

SUBPENA OFFICE.

It is the duty of the patentee
office, by himself, or his sufficient
ties, to make out, write, and engr
subpæna sued out of the Court of C
with the great seal. (a) These

The hours of attendance at this office are, in term time, from eleven in the morning till two in the afternoon, and from five till eight in the evening; and in the vacation, from eleven in the morning till two in the afternoon. The holidays usually kept are, January 8, 18, 25, and 30; February 2, Ash Wednesday, March 25, Easter Monday, Tuesday, and Wednesday; April 23, May 4 and 29; Whit Monday, Tuesday, and Wednesday; June 24; July 25, August 12, 16, and 21; September 2, 22, and 29; October 25 and 26; November 4 and 5; December 21, 25, 26, and 27.

PURSE-BEARER.

This officer is to pay constant attendance upon the Lord Chancellor, to receive all warrants and writs of privy seal; to write the proper receipt thereon, and lay the same before the Lord Chancellor, for his signature to the receipt; and also, to take and execute all orders relative to the keeping, opening, and fixing the great seal to all grants, patents, commissions, writs, and instruments, whether by public or private seal. The duties of the office are executed by the purse-bearer in person; principal and deputy do not appear to have been appointed since the year 1756.

He is to receive, examine, and v
to all petitions preferred to the
in causes and other matters not
duties of the other secretaries; a
ting the same to his lordship for
signature, to return the petition
have presented them. He is to
tition, and the answer thereto, in
that purpose; and to make out for
certain officers, including the re
such petitions as are to be heard.
the hearing of all petitions preferr
Chancellor, as visitor, on behalf of
take minutes of, and to draw up, t
thereon, and to enter such orders
fore-mentioned; he is to prepare a
missive to peers and privileged pe
prepare and issue warrants to the s

titled to set down ; he is to make out and enter, in the before-mentioned book, the appointments of the Accountant General, the deputy registers, the clerk of the reports, and the entering clerks ; and also to make out and enter in the same book the usual order on the appointment of a Master in Chancery, for transferring to him all causes and other matters, which had been, by former orders, referred to his predecessor. He is to enter in the same book the certificates from the Lord Chancellor to the clerk of the hanaper, authorizing payment to the messenger, or pursuivant attending the court, of certain charges on proclamations, and writs of election.

The principal secretary's office is open, and attendance is there given, on every day in the year, (excepting Sundays, Good Friday, and Christmas day,) from nine in the morning till nine in the evening.

**LORD CHANCELLOR'S SECRETARY OF DECREES AND
INJUNCTIONS.**

This officer is to receive and examine the dockets of decrees and dismissions, which are to be enrolled, and to write the orders upon petitions relating thereto ; to receive and examine all orders for injunctions and the writs of injunction and

50 *Officers of the Court of Chancery.*

dockets (which are copies of the writs); to procure his lordship's signature to such dockets of decrees or dismissions, orders upon petitions, writs of injunction and dockets, and to make an entry of the same in a book kept for that purpose; also, to receive and enter in the same book all *caveats* against signing and enrolling decrees or dismissions, and to give notice thereof to the parties concerned.

CHIEF SECRETARY OF THE MASTER OF THE ROLLS.

The duties of this officer are to attend his honour in court, and on all other public occasions; to attend in the office in the rolls for the despatch of business; to peruse and present to his honour every petition preferred to him, (except such as it is the duty of the under-secretary and secretary of causes to present,) and to write thereon the answer or order given by his honour; to enter in a book, kept for that purpose, in the office, the name, and time of admittance, of every six clerk, sworn clerk of the six clerks' office, and waiting clerk of the same office; also to enter therein the name of every articulated clerk of the same office, at the time of his entering into articles with any of the sworn clerks of that office, and the date of such articles; and to give notice in writing of the application of every person to be entered an arti-

clerk, previous to his executing his articles of clerkship; to enter in the same book the name and time of admittance of every clerk of the petty bag office, and of every examiner of the Court of Chancery, and of every copying clerk in the examiner's office; to peruse and examine the credentials of artickled clerks, and of attorneys applying to be admitted solicitors of the Court of Chancery, previous to their examination and admission by his honour, and to enter in a book due notice of every such application. The attendance at this office, from the first seal before every term to the last seal after term, is from ten in the morning till two in the afternoon, and from six till eight in the evening. From the last seal after every term, to the first seal before the ensuing term (except as after-mentioned) the attendance is from ten in the morning till two in the afternoon; from the petition day following the last seal after Trinity term, to the petition day before Michaelmas term, the attendance is from ten in the morning till one in the afternoon.

The holidays are from Thursday before, till Monday after, Easter week; from Whit Sunday till the Monday week following, and from the 24th of December till the 7th of January; also, the 30th of January, 2d of February, Ash Wednesday, Ascension day, 29th of May, 24th of June; 12th, 16th, 21st, and 24th of August; 14th, 21st, 22nd,

UNDER SECRETARY AT TH

The duties of this officer are to
sent to the Master of the Rolls e
the admission of a plaintiff or d
or defend *in formâ pauperis*, and
presented by a pauper after admis
by a person entitled to the privileg
to write thereon the answer or on
honour, and to procure the same
him; to enter the name of the caus
order is made, and the order in a
that purpose; also to enter in a b
every cause in which any petition i
which the chief secretary has a fee
and the order made on such petitio
wise to perform the duties of the

SECRETARY OF CAUSES AT THE ROLLS.

The duties of this officer are to set down causes for hearing before the Master of the Rolls, and to draw and sign a note to the register, certifying to him the name of every cause so set down; to peruse, present to his honour, and write the order upon all petitions of the following kind; viz. for setting down of causes, to have bills taken *pro confesso*, and for setting down of causes at the request of the defendant, and for restoring to the paper causes which have been struck out thereof; also, to write the order on petitions for rehearing and for setting down of causes upon a Master's report upon an equity reserved, and for further directions; and, also, on petitions for adjourning of causes.

The hours of attendance of this officer, and the holidays kept by him, are the same as those of the chief secretary.

SECRETARY OF DECREES AND INJUNCTIONS AT THE ROLLS.

This officer is to present to the Master of the Rolls the docket of every decree or dismission, pronounced by his honour, to be signed by him

tion granted by his honour, and p
to his honour for signature ; to s
same book all *caveats* that shall b
entered against his honour's signi
dismissal, and to give notice ther
ties concerned, and to attend his h
of such business is to be transacted.

His hours of attendance at the
holidays kept by him, are the same
chief secretary.

**KEEPER OF THE RECORDS IN THE
OR CLERK OF THE CHAPEL AT**

The duty of this officer is to tak
records in the chapel at the rolls:

of parliament, or their committees, and the courts of judicature, with the records, when required ; to attend the Master of the Rolls on cancellations of records, of recognizances, deeds, and letters patent.

The hours of attendance are from ten in the morning till three in the afternoon, and from five till eight in the evening. The holidays are, one week at Christmas, one week at Easter, and one week at Whitsuntide, besides Good Friday, and general thanksgiving and fast days.

Besides the above officers, there are, clerks to the deputy registers, clerk of the exceptions, and agent to the senior deputy register, agent to the master or clerk of the report office, clerks of the entries, agents or clerks to the clerks of the entries, copying clerks in the examiner's office, deputy agent or under clerk of the six clerks, sixpenny writ office, chaff wax, deputy chaff wax, sealer, deputy sealer, usher of the court, deputy purse bearer, the serjeant at arms, messenger or pursuivant attending the Court of Chancery, gentlemen of the chamber attending the great seal, usher of the hall at Lincoln's Inn, or at the Lord Chancellor's, crier of the court, deputy of the warden of the Fleet, or the Lord Chancellor's tipstaff attending the court, doorkeeper of the court, keeper of the court, gentlemen of the

chamber attending the Master of the Rolls, usher of the hall at the rolls, porter at the rolls, tipstaff to the Master of the Rolls, secretary to the Vice Chancellor of England, trainbearer to the last-mentioned judge, and usher to him.

SOLICITORS.

With respect to solicitors, they are officers of the court. They are admitted to that office by the Master of the Rolls, upon a certificate of character signed by two barristers ; and are sworn in at the Rolls Court, usually on the day after the term. A solicitor is sued, and may be sued, in the same mode as any other person. The court will strike him off the rolls of solicitors, if he misconducts himself. He may also at his request have his name struck off the rolls ; but he must make an affidavit that he has no other reason for his application besides that which he states. (a) If a solicitor has become incapable of practising (without being re-admitted) in consequence of having neglected to obtain a certificate for one whole year, the court will on his application order him to be re-admitted, on payment of a small fine only, without any arrears of duty. (b) And it is

(a) Ex-parte Owen, 6 Ves. 11. Ex-parte Foley, 8 Ves. 33.
 (b) Ex-parte Murray, 1 Turner, 56. Ex-parte Adey, in note to that case.

useful to observe, that no solicitor is entitled to fees for attending on any proceedings before the Master, without having taken an office copy of such proceedings. And it may be proper to add, that a solicitor cannot give up his client, and act for the opposite party in any suit between them. (a) And this rule extends to solicitors in partnership, who cannot dissolve their partnership against their client without his consent, so as to enable the retiring partner, as discharged, to act against him. (b) The right of the solicitor to refuse to answer, when he can only answer by a breach of confidence, is not the privilege of the solicitor, but of the client ; if he answered, knowing what he did, it would be a great offence. (c) But the court will not, upon motion, restrain a solicitor examined from giving evidence of confidential matters ; as the propriety of his being examined is left to the consideration of the court, before whom he might appear as a witness. (d)

Lord Rosslyn determined that a solicitor admitted to the Court of Chancery, might practise on the equity side of the Exchequer, without being admitted a solicitor in the latter court. (e) But

(a) *Cholmondeley v. Clinton*,
19 Ves. 261.

(b) *Ibid.* 19 Ves. 273.

(c) See *Beer v. Ward*, 1
Jacob, 82.

(d) *Beer v. Ward*, 1 Jacob,
77.

(e) *Meddowcroft v. Hol-*
brooke, 1 Hen. Black. 50.

consent in writing authorize a
Court of Exchequer to practise i

(a) Vincent v. Holt, 4 Taun

CHAPTER II.

FILING OF BILL AND PROCESS, AND CONTEMPTS.

Of the Commencement of a Suit; Subpœna to appear and answer; Service of Subpœna; Letter Missive; Attachment; Attachment with Proclamations; Commission of Rebellion; Serjeant at Arms; Sequestration; Distringas; Habeas Corpus; taking Bills pro confesso; Contempts.

SECTION I.

Of the Commencement of a Suit.

A **SUIT** in the equity side of the Court of Chancery, on the behalf of a subject merely, is commenced by preferring a bill, in the nature of a petition, to the Lord Chancellor, Lord Keeper, or Lords Commissioners for the custody of the great seal, or to the King himself, in his Court of Chancery, in case the person holding the seal is a party, or the seal is in the King's hands.

The solicitor for the plaintiff ought to take care to procure from his client a special authority to

institute the suit; (a) but a general authority is sufficient to enable a solicitor to defend a suit. (b) If a power of attorney is given to institute a suit, it is quite unnecessary to state it in the bill; but if the statement is made, it is not requisite to prove it at the hearing, but the court will direct the Master, to whom the cause is referred, to inquire into that fact. (c)

A suit thus preferred, has been commonly termed a suit by English bill, by way of distinction from the proceedings in suits within the ordinary jurisdiction of the court, which, till the statute 4 Geo. II. cap. 26, were entered and enrolled formerly in the French or Norman language, and afterwards in the Latin, in the same manner as the pleadings in the other courts of common law. (d) All persons of full age, not being *femes covert*s, idiots, or lunatics, may, by themselves alone, exhibit a bill; but infants, married women, (except the wife of an exile, or of one who has abjured the realm,) and idiots, and lunatics, are incapable of exhibiting a bill by themselves alone.

An infant sues by a person who, in the bill, is styled his next friend, and who is usually some near relation or friend of the infant. The court permits

(a) *Wilson v. Wilson*, 1 Jac. and Walk. 457.

(c) *Edney v. Jewell*, 6 Madd. 165.

(b) *Wright v. Castle*, 3 Mer. 12.

(d) *Mitf.* 6, 7.

any person to institute a suit in his behalf; but the next friend is liable to the costs of the suit, and to the censure of the court, if the suit is improperly instituted; and he cannot withdraw himself from the suit without a reference to the Master, to inquire whether it is for the benefit of the infant that another next friend should be appointed. (a) The next friend must be a responsible person. (b) And it seems, that if it appears he is not sufficient to answer the costs, the court will order another to be named. (c) But where a new next friend is proposed to be substituted, the court will not, on the suggestion of counsel that he was in indigent circumstances, direct an inquiry into his circumstances. (d) The court will remove a next friend, and refer it to the Master to approve of a new one, where the former is so connected with the defendant, having an interest adverse to that of the infants plaintiffs, as to make it probable that their interests will not be protected by him. (e) If the next friend does not, in the process of the suit, do his duty, he may be removed; but the court will not, on the application of the infant, direct an inquiry whether the cause has been properly conducted. (f) Where the next friend is a

(a) *Melling v. Melling*, 4 Madd. 261.

(b) *Mitf.* 21.

(c) *Wy. Pract. Reg.* 349.

(d) *Davenport v. Davenport*, 1 Sim. and Stu. 101.

(e) *Paton v. Bond*, 1 Sim. 390.

(f) *Russell v. Sharpe*, 1 Jac. and Walk. 482.

amy, the court will make an or
cation of the defendant, that
within a certain time, procure a
prochein amy, to prosecute the
defendant should be at liberty
person as his next friend for that
infant, when he comes of age,
bill, but he cannot compel the
the costs, unless it be established
improperly filed.(c) And as be
and the *prochein amy*, it was the
Thurlow, that no degree of mist
hension of the *prochein amy* sho
to charge him with costs ; nothin
honest intention.(d)

If it is represented to the cour
or petition, that a suit, preferred

Masters; and if he reports that the suit is not for his benefit, the court will stay the proceedings. But the next friend himself cannot obtain this reference. (a) But the above reference will not be directed unless there be a strong case of no benefit, or of improper motive. (b) However, where a suit was instituted on the behalf of infants, by a solicitor wholly unconnected with the family, the usual reference, on the motion of the defendant, was made, the defendant undertaking to render to the Master the accounts prayed by the bill. (c) If two suits, for the same purpose, are instituted, in the name of the infant, by different persons, acting as his next friend, the court will direct an inquiry to be made by a Master, which suit is most for his benefit; and such an order may be obtained upon a motion of course; (d) and when that point is ascertained, the court will stay the proceedings in the other suit. (e) But, after a decree in one of two suits, commenced in the name of an infant, the other not having arrived at a decree, it is not usual to make this reference to the Master; but, under circumstances, the next friend in the suit in which the decree had been obtained was removed; and the next friend in the other

(a) *Jones v. Powell*, 2 Mer. 141.

(b) *Stevens v. Stevens*, 6 Madd. 97.

(c) *Richardson v. Miller*, 1 Sim. 133.

(d) *Sullivan v. Sullivan*, 2 Mer. 40.

(e) *Mitf.* 27.

person. But whenever the husband has an interest in the subject matter of the bill, he is entitled to sue in his own name, and the bill is so styled in the bill. And in the case of a next friend died, the court order should be dismissed, unless a new next friend named within two months, and the costs paid out of a fund in court arising out of the estate. (b) But the bill cannot be brought out her consent; and if such bill is brought without her affidavit of the matter, it will be dismissed. The deposition of her next friend is not admissible for her, as he is liable to the cost.

Idiots and lunatics also are incapable of suing by themselves. The person having the custody of them is liable to the cost.

him, under the royal sign manual; and upon an inquisition finding a person an idiot or lunatic, grants of the custody of his person and estates are made to such persons as the Lord Chancellor, Lord Keeper, Lords Commissioners of the great seal, shall think proper. They are called committees; and idiots and lunatics sue by the committee of their estates; (a) but a bill is not demurrable because a lunatic and his committee are co-plaintiffs. (b) But instances are to be met with, where the Attorney General has sued on behalf of idiots and lunatics, on the ground that they were under the peculiar protection of the Crown, (c) but the information cannot be at the relation of the lunatic. (d)

If the suit is instituted on behalf of the Crown, or of those who partake of its prerogatives, as the Queen consort, or of those who are under its peculiar protection, as the objects of a charity, the matter of complaint is offered to the court by way of *information* given by the proper officer, and not by way of petition. (e) The proper officer of the Crown to exhibit this information is his Majesty's

(a) Mitf. 28.

Parkhurst, 1 Cha. Ca. 112

(b) Ridler v. Ridler, 1 Eq. Ca. Ab. 278.

and 153.

(d) Attorney General v.

(c) The Attorney General v.

Tiler, 1 Dick. 378.

(e) Mitf. 7.

rights of the Crown, the office of information depends upon the person who is named in it, and the relator. But, by act 59 Geo. II. in informations, the Attorney General may file information without the intervention of the Attorney General. The suit, when a relator is named, is in the name of the relator; the information is afterwards carried on in the name of the relator; but it must be signed by the Attorney General, who, when he puts the seal to it, requires that the counsel for the relator should state to him, in writing, the object of it, and that the information is proper to carry such object into effect. The information also requires the name of the Attorney General; if filed without such sanction, the information is to be taken off the file. (c) The relator is liable for the costs of the information.

or if there be only one relator, and he dies, the court will not permit any further proceedings, till an order has been obtained for liberty to insert the name of a new relator, and such name be inserted accordingly. (a) But if there are several relators, the death of any one of them, while one survives, will not in any degree affect the validity of the suit. (b) But the application for a new relator must be made by the Attorney General, and not by the defendant, it not being competent for the defendant to choose his own prosecutor. (c)

These informations, *ex relatione*, are generally filed in charity cases. But it is not necessary that the relators should be persons principally interested: any person, though the most remote in the contemplation of the charity, may be a relator. (d) If the relator has a substantial interest in the matter in dispute, the pleading is usually both an information and bill, and he stands in the character of plaintiff as well as relator. (e) Provided that the suit can be maintained by the Attorney General, the circumstance of his joining as a relator a person who is not entitled to the equitable relief which he seeks, will not vitiate the proceedings. (f)

(a) Mitf. 91.

(b) Ibid.

(c) Attorney General v. Plumptree, 5 Mad. 452.

(d) Attorney General v. Bucknall, 2 Atk. 328.

(e) Mitf. 91.

(f) Attorney General v. Brown, 1 Swanst. 305.

costs. (a) The rules of proceedings are the same as those upon

It often happens, that before a bill is presented to the court, the court refers it to the Master, to be for the benefit of the persons who are to be commenced; as in the case of infants and lunatics; or where there is a joint expense of the different parties depending, or of several persons having an interest in the subject; but the court will not allow the suit to be commenced upon a bill without a previous reference. (b)

As a security that the bill does not contain any thing improper, the court requires that the bill have the signature of counsel to certify that it is not, the bill will, upon the certificate

tiff's expense. (a) And that defect is a good ground of demurrer; (b) and, anciently, the court had ordered that the defendant should not answer till counsel had signed the bill. (c) The counsel signs the draft of the bill, and when the bill is engrossed, his name must appear on the engrossment. After the bill is drawn and engrossed, it is to be carried to a clerk in court to be filed, (d) who first enters it in his cause book, and then in the general bill book; after which, he marks it at the top with the day of the month and year on which it is brought into the office, (e) and subscribes his name at the bottom, on the left side, and then delivers it to his six clerk to be filed; (f) which the latter accordingly does, having entered it also in his book. And an amended bill is not considered as on the file for the purpose of an attachment, for want of an answer, before an entry is made of the amendments in the six clerk's book; and there is not any difference in this respect between the amendments of a bill which

(a) Beames' Cha. Ord. 25, 166. Dillon v. Francis, 1 Dick. 68. hearing of the cause, that the bills and answers were duly filed. Beames' Cha. Ord. 135.

(b) Kirkley v. Burton, 5 Mad. 378. Prax. Alm. 4 Cary's Rep. 82, 1 edit. (e) Ibid. 168.

(f) Ibid. 110, 123, 135, 140, 144, 168, 187, 231. It is not to be copied and filed till the hand of the clerk is put to it.

(c) Carey, 93.

(d) Note. There is an old order, which directs that certificates shall be brought at the Ibid. 110, 123, 187.

In bills of particular description that an affidavit should be annexed to their being filed. In a bill of discovery, there must be an affidavit, that the plaintiff includes with any of the defendants; if a debt is due from him he must bring it in, or at least, offer to do so by his bill. (In a bill of discovery, a party in a suit at law to examine a witness, there must be an affidavit, that the party proposed to be examined falls within the description of the descriptions which will be given on the subsequent page. If a bill is filed for the benefit of an instrument, on which no law would lie, alleging that it is for the discovery of any instrument, that it is in the custody or power of the defendant, and praying any relief which might be granted if the instrument was in the hands of the defendant, an affidavit must be annexed to

former case, that the instrument is lost; and, in the latter instance, that it is not in the custody or power of the plaintiff, and that he knows not where it is, unless it is in the hands of the defendant. (a) In any of these instances, the want of the requisite affidavit makes the bill demurrable; (b) but if the relief sought extends merely to the delivery of the instrument, or is otherwise such as can only be given in a court of equity, such an affidavit is not necessary. (c)

SECTION II.

Subpœna to Appear and Answer.

The bill prays for a writ of *subpœna* to be directed to the defendant, commanding him, on a certain day, and under a certain penalty therein to be inserted, personally to appear in chancery, and then and there to answer the premises, *and to abide such order and decree therein as the court shall make.* But if the bill be merely for a discovery, or to perpetuate the testimony of witnesses, the latter words in italics ought to be left out. (d)

After the bill is put on the file, the clerk in court, or solicitor, makes out a *subpœna* note or

(a) Mitf. 112 and 113.

(b) Ibid. 131.

(c) Ibid. 113.

(d) Rose v. Gannell, 3
Atk. 439.

Subpæna to Appear and Answer.

præcipe, thus : "*subpæna* A B to appear in chancery, returnable at the suit of C D," and he must put his name at the bottom of the note. This is carried to the *subpæna* office, where a writ of *subpæna* is made out, and sealed according to the prayer of the bill. Where there are several plaintiffs, all of them need not be named either in the *præcipe* or writ; but it is sufficient to say, "at the suit of first plaintiff and others, or another;" (a) but the defendants must be named. To this *subpæna* is fixed a small piece of parchment, called a *return*, containing the name of the defendant and plaintiff, and the day of appearance.

But it might have been obtained against an officer of the court without the usual affidavit, because he is presumed always to attend. (a) But now, by the 1st of the general orders of the 3d April, 1828, every plaintiff, as well in a country cause as in a town cause, shall be at liberty, without affidavit, to obtain an order for a *subpœna*, returnable immediately; but such *subpœna*, in a country cause, is to be without prejudice to the defendant's right to eight days' time to enter his appearance after he has been served with the *subpœna*.

If the defendant is a member of parliament, his being in London during the sessions would, it seems, have been considered as a town residence, so as to entitle the plaintiff to a *subpœna*, returnable immediately, although the defendant's place of residence was in the country. (b) But the professional residence of a barrister, at chambers, having a place of residence in the country, which was the place of his abode, was not considered as town residence. (c) And if a defendant had a town residence and a country residence, and a *subpœna*, returnable immediately, was left at his town house, while he was at his country residence, his appearance, *gratis*, as in a town cause, would not make it so. (d) But in Gilb. For. Rom. p. 43, it is said

(a) Anon. Mos. 42.

(c) Hind, 92.

(b) Hind, 92. Attorney Ge-

(d) Ibid.

neral v. Stamford, 2 Dick. 744.

returnable immediately, for it
be made returnable on any day
the plaintiff.

It is enacted, by stat. 4 And
that no *subpoena*, or other process
shall issue till after the bill filed
officer, and a certificate thereof
subpoena office. An exception
made in cases of bills for injunction
or to stay suits at law common
cases, it is sufficient if the bill be
the third day after the return of the
if the bill be not on the file by then
in any other case, a *subpoena* shall
before the bill is on the file, no costs
be incurred by the defendant in re-
newance if the bill is not on the file.

upon the file, the defendant, on finding this to be the case, may obtain his costs ; for which purpose, his clerk in court usually makes out a bill of costs, which is afterwards taxed by the Master ; and the payment may be enforced by *subpæna*, and the other process of the court, which will be after mentioned ; and the plaintiff will not be permitted to file his bill till he has paid his costs.

SECTION III.

Service of Subpæna.

The service of the *subpæna* is either by delivering the body of the writ to the party himself, or by leaving it at his dwelling house with one of his family, (a) or if he has no house, at the last place of his usual residence, (b) provided he has but recently quitted such residence. If he has left it for a year and upwards, service there will not be sufficient. (c) If the defendant keeps the door of his dwelling house shut, and refuses to open it, and the writ under seal is left hanging upon the door of the house, or is put into the house under the door, or within the window, this is good service, if it afterwards come to the defendant's

(a) Beam Cha. Ord. 169.

(b) Gilb. For. Rom. 41.

(c) Parker v. Blackburn, 2 Vern. 369.

By the old practice, if there was a writ of *subpœna* against a defendant in the *subpœna*, the writ was labeled, which is a short copy of the writ of *subpœna*, as it relates to each defendant. If the writ was served personally on the defendant, the writ was met with, and the body of the writ was sealed at the same time shown to the defendant in respect to the second; and the body of the writ was reserved for the last. (d) By the general orders of 3d April, 1848, it was ordered that *subpœna* to appear, or to appear and answer, be sued out for each defendant, whether he was husband and wife defendants, or not. The costs of all such writs shall be costs of the plaintiff.

If the bill be to stay proceedings in the action, the plaintiff in the action be allowed, the court will grant an order, that service be made on the defendant.

sufficient affidavit, entering an appearance for the defendant by the attorney will not prevent the order from being discharged ; for it is an erroneous one. (a) But it is not necessary that the affidavit, upon which the order is applied for, should state a previous application to the attorney to accept a *subpœna*, and a refusal by him. (b) And a similar order will be made, as to the defendant at law, who having refused his consent to a commission for the examination of witnesses abroad, a bill is filed against him by the plaintiff at law, to obtain a commission for that purpose, and the defendant at law retires from the jurisdiction of the court. (c) So, service on one defendant, who was agent and late partner of another defendant abroad, was ordered to be good service on the latter, in a bill to stay proceedings at law. (d) And the court dispensed with the usual service of *subpœna* in a case where the object was to get an answer to an amended bill, which would be important, and the defendant had appeared before on two motions, and was abroad. (e) But in the case of *Roberts v. Worsley*, (f) the then Master of the Rolls, in a case

(a) *Levi v. Ward*, 1 Sim. Bunb. 107. Sed vide *Love v. and Stu.* 334. Baker, 1 Cha. Ca. 67.

(b) *French v. Roe*, 13 Ves. 593. (e) *Gildenichi v. Charnock*,

(c) *Devis v. Turnbull*, 6 Mad. 6 Ves. 171.
232.

(f) 2 Cox, 389.

(d) *Carrington v. Cantillon*,

rendant, of the *subpœna* to answer.
His honour in that case observed
several applications of a similar
nature had never been attended with
success. The court has ordered service on the
defendants, who secreted themselves, and
not being found, (a) and on their return
to be deemed good service. The court
ordered, that leaving a subpoena at the
door of a prison is good service, if the
prison is large. If the defendant be a clergyman,
service is good without motion. The
Pract. Reg., (d) that no process be
served on a prisoner committed at the
gaol without leave. Service of a subpoena
by sending it to the defendant, or to some
person to whom he desired the subpoena
to be delivered, or by sending his letters
to the defendant, was deemed good
service. (e) And if the defendant be
an attorney, or a solicitor, or a

attorney to a person in this country to prove the will, the court will allow service of the *subpœna* on such person to be good service on the defendant. (a) For the executor proves the will, by means of his attorney, for the purpose of possessing himself of assets, which are liable to the demands of the person who sues in equity; the proceedings are at the moment under the direction of his agent, who must have an immediate correspondence with his principal for that purpose. (b) But the mere circumstance of a proctor taking out letters of administration of an intestate, for a person residing abroad, is not such a proof of general agency with respect to the assets of the intestate, as to induce the court to order service of the *subpœna* upon the proctor to be good service on the administrator. (c) But if the proctor has, on the part of the administrator, made an application to a debtor of the estate for payment of the debt, this will be considered as a proof of such agency, and the court will then make the order. (d) But in a case where the defendant, who resided abroad, gave a general power to another to act for him in the management of his affairs, the court refused to substitute service of the *subpœna* on

(a) *Hales v. Sutton*, 1 Dick. 26. *English v. Hendrick*, 1 June, 1821.

(b) See 1 Sch. and Lef. 239. (d) *Ibid*.

(c) Per Sir J. Leach, V. C.

service. (b) In a bill of rev
absconding, the court will not
of the *subpœna* on the defend
in court, for service on the defe
will the court, in cases where t
injunction to stay proceedings
the circumstance that the def
the jurisdiction of the court, a
filed a bill relative to the same
vice on their clerk in court by
filed should be good service, (c
service on an agent, who, bei
admits that his principal is ab
the court, in a cross cause, beca
are numerous, many being out c
others not to be found, and so
realm, direct that service on the

(a) *Smith v. the Hibernian* (d) R.

in the original cause should be sufficient. (a) But in a case of a *single* defendant in a cross cause, the court made the order, the defendant living in Ireland. (b) In a bill against two partners, where one was abroad, the court ordered that the service of the *subpœna* against the partner abroad, on the partner at home, should be deemed good service on the former. (c) By the 20th order of the general orders of 1828, service of *subpœna* to answer amended bill on the defendant's clerk in court is to be deemed good service. If a bill be filed against a corporation, the process must be served on some one of the members. (d)

With respect to the time and place of service, it is to be observed, that the *subpœna* must be served before the return thereof; but service on the return day is good, and, as it seems, it may be served any time before twelve at night on that day. (e) Service on a Sunday is not good service, (f) and the court will set aside an attachment under it before appearance, on the defend-

(a) *Anderson v. Lewis*, 3 Bro. C. C. 429.

(b) *Gardiner v. Mason*, 4 Bro. C. C. 478.

(c) *Coles v. Gurney*, 1 Mad. 187.

(d) *Hind*, 87.

(e) See *Maud v. Barnard*, 2 Burr. 812, and 1 T. R. 102; but in *Gilb. For. Rom.* 42, it is said, that it must be served before noon of the last day.

(f) *Mackreth v. Nicholson*, 19 Ves. 367.

to the service of the *sub*
should take care not to appea
to set aside the attachment w

If, upon service of this pr
beat the party serving it, o
contemptuous words against
process thereof, the defend
attachment. (c)

SECTION IV

Letter Missiv

In the case of a peer or
parliament, after the bill is

(a) *Mackreth v. Nicholas*

presented to the Lord Chancellor for his letter, called a letter missive, which requests the defendant to appear and answer the bill; and upon affidavits of the defendant's residence within ten miles of London, the Lord Chancellor will desire the defendant's immediate attendance. This letter must be delivered to the defendant, or left at his house, with an office copy of the bill signed by the six clerk; and if the defendant refuses upon such service to appear thereto, he is to be served with a *subpœna* in the same manner as any other defendant. The privilege in question is a privilege of peerage, not of parliament, and it extends to all Scotch and Irish peers, not members of the House of Commons; (a) and, therefore, an injunction to stay proceedings at law against an Irish peer, unless preceded by, or accompanied with, a letter missive and office copy of the bill, is ineffectual, as it would be against an English peer. (b)

The practice of sending a letter missive to a peer was introduced about the 16th Elizabeth. (c)

It was also the privilege of a member of the House of Commons, till lately, that he, when de-

(a) *Robinson v. Lord Rokeby*,
8 Ves. 601. *Lord Milsington*,
v. Earl of Portmore, 1 Ves. and
B. 419.

(b) 1 Ves. and B. 419.

(c) *Gilb. For. Rom.* 65.

fendant to a bill, should be served with an office copy of the bill, together with a *subpœna*; but the statute 47 Geo III. c. 40, has dispensed with the necessity of leaving an office copy with him.

SECTION V.

Attachment.

If the defendant has been regularly served with the *subpœna*, and neglects or refuses to appear, or, having appeared, refuses or omits to put in his answer within the regulated time, he is considered to have incurred a contempt of the court; upon which (except in the cases of a peer, or a lord of parliament, or member of the House of Commons, where the first step to enforce obedience to the process of the court is a sequestration) an attachment issues. No attachment is to issue for not appearing, but upon affidavit of the day and place of the service of the *subpœna*, and the time of the return thereof, whereby it shall appear that service was made, if in London, or within twenty miles thereof, four days, at the least, excluding the day of such service; and if above twenty miles, then to have been eight days before such attachment was entered. (a)

(a) Beam. Cha. Ord. 169.

An attachment is a writ under the great seal, directed in general to the sheriff of the county where the person in contempt is residing, commanding the sheriff to attach the person in question, so as he may bring the offender into court, at a certain day, to answer the contempt. But if the party to be attached is residing within the counties palatine of Lancaster, Chester, or Durham, the attachment is directed to the Chancellor of the first, to the Chamberlain of the second, and to the Bishop of the last, directing him to issue his process to the sheriff to attach the party. The writ must be made returnable in term, and there must be fifteen days between the *teste* and the return in proceeding to a sequestration, or to take a bill *pro confesso*, unless the defendant live within ten miles of London, and then an order may be obtained to make the several processes of contempt returnable immediately. (a) Where the attachment is returnable within eight days after the purification, they mean eight entire days. (b) This writ ought not to be sealed before the party is actually in contempt; if it is, the court will set it aside with costs, notwithstanding it is not executed till after the party is in contempt, and though an offer has been made to pay all the costs which the other party has been put to. (c)

(a) Hind, 100. Beam. Cha.
Ord. 199.

(c) Frowd v. Lawrence, 1
Jac. and Walk. 655.

(b) Mootham v. Waskett,
1 Mer. 243.

The several processes of *subpœna*, attachment, and commission of rebellion, issue without motion. (a) If the contempt is, for not having appeared, there must be an affidavit of the due service of the *subpœna*, (b) and that the defendant has not appeared; but if, for not having answered after appearance, this writ may be had without affidavit. In neither case is notice necessary; but, in point of courtesy, the party suing out the attachment usually apprises the adverse clerk in court of his intention to sue out this process. (c) The purpose for which it issues is endorsed on the writ, as for want of appearance, or for want of an answer. This writ, and the cause of issuing, must be entered in the register's book. (d)

If the sheriff attaches the party, which must be done before the return day, he may take bail of him to appear or answer on the return of the writ; but the officer is not compelled to do it. (e) The return to be made upon the arrest, is *cepi corpus*; upon which, if the sheriff has let the defendant out on bail, a messenger must be moved for to bring up the defendant, (f) which, upon the production of the writ and the return, will be granted of course. If the sheriff takes a bail bond from the defendant,

(a) Gilb. For. Rom. 81.

(e) Studd v. Acton, 1 H.

(b) Beam. Cha. Ord. 169.

Black. 468.

(c) 1 Turn. Cha. Prac. 526.
Hind, 34.(f) Holme v. Cardwell, 3
Madd. 114.

(d) Beam. Cha. Ord. 110.

under an attachment, and delivers it to the plaintiff, the latter cannot afterwards rule the sheriff to bring in the body,(a) but he may have a messenger.(b) If the sheriff has the defendant in actual custody, the proper application is for a *habeas corpus*.(c) But if, upon the sheriff's return to an attachment, that he has the defendant in actual custody, it appears that, from illness and infirmity, the defendant could not be removed, a messenger will be ordered.(d)

Formerly, the court allowed messengers to those particular jurisdictions only, where the sheriff had the amercements ; and they were sent in those cases, because, as the sheriff might disobey the writ with impunity, there was no other way left to do justice to the plaintiff.(e) However, the rule now is, to send a messenger into every county generally, without any restriction.(f) And the court has granted a messenger, although the distance has been very con-

(a) Anon. 2 Atk. 507.

(f) 2 Atk.507, Anon.; 1 Vern.

(b) Ibid. Vide 6 Price, 32.

116 and 154 ; Wilkinson v.

(c) See Post. Neame v. Wagstaff, 1 Sim. 389. Vide Holme v. Cardwell, 3 Madd. 114.

Belsher, 2 Bro. 181 ; Miles v. Lingham, 7 Ves. 230. But see Anon. 2 P. W. 301, where, it appearing that the sheriff had the amercements, the Lord Chancellor denied a messenger, but ordered the sheriff to bring in the body.

(d) Miles v. Lingham, 7 Ves. 230.

(e) Harr. Cha. Pract. Edit. 1808, Page 119.

Attachment.

erable, as two hundred miles. (a) It was the opinion of Sir J. Leach, V. C., that if the defendant cannot be taken by the messenger, the court will make an order for a sequestration. (b) If the messenger, who is ordered to bring up the defendant upon the sheriff's return, dies, the serjeant at arms will be ordered to go. (c) If the defendant is at the time when the attachment issues against him, in the custody of the King's Bench prison, the attachment is to be lodged with the marshal, and a *habeas corpus* may be then moved for, before the return of the attachment, to bring up the defendant, and have him turned over to the sheriff. (d)

taken off the file. (a) And he may file a plea of outlawry, although a dilatory plea. (b) But if, after orders for time to plead answer or demurrer, not demurring alone, the defendant is *attached* for want of an answer, and he files an answer *and* demurrer, the court will order both to be taken off the file. (c) But if, after the defendant had filed the answer and demurrer, the plaintiff obtains an order for a messenger, before the answer and demurrer had been taken off the file, and although he had bespoken an office copy, the order will be discharged with costs. (d) But the defendant, upon tendering the costs of the attachment, may have a commission to take an answer, (e) and a month's time to answer. (f)

When the defendant is taken by the messenger, he will be committed to the Fleet prison, unless he clears his contempt, *i. e.* till he enters his appearance, or puts in his answer or plea according

(a) *Barbery v. Crawshaw*, 6 Madd. 284.

(b) *Walters v. Chambers*, 1 Sim. and Stu. 225. It seems that the Court of Exchequer has allowed a defendant, after an attachment, for want of an answer, upon clearing his contempt, to file an answer and demurrer. *Crosse-*

ratt v. Tollett, 3 Swanst. 184. For more on the subject, the reader is referred to *Titles of Pleas, Answer, Demurrer*.

(c) *Curzon v. De la Zouch*, 1 Swanst. 185.

(d) *Ibid.* 189, in note.

(e) *Mainwaring v. Wilding*, 3 Madd. 41.

(f) See 1 Swanst. 194.

Attachment.

the nature of the contempt, and pays or tenders the costs incurred by it. Upon the defendant's doing this, he will be entitled to his discharge. (a)

But it is proper here to observe, that where defendant is in contempt for want of an appearance, or of an answer, and enters his appearance, files his answer, and then tenders to the plaintiff the costs of his contempt, and those costs are refused, it is necessary, in order that he might be discharged from his contempt, that he should obtain an order for that purpose ; which is made of course, upon the six clerks ; certificate of his appearance or answer, and upon the payment or

Where an infant is attached for want of appearance, or an answer, in order to get rid of the attachment, the course is to order a messenger to bring the infant into court to have a guardian assigned. (a) If no person on the infant's behalf be assigned his guardian, the court usually orders the six clerk not toward the cause to be assigned his guardian, *ad litem*. (b) But an infant cannot be kept in the custody after a guardian is assigned him; and an infant pays no costs of a contempt; the plaintiff always pays the messenger. (c)

Ordinarily, if a *feme covert* be in contempt, the husband is also liable to process of attachment. (d) But the court has stayed process of contempt against the husband for want of his wife's answer, on affidavit, that she had left him, and he had no power over her. (e) Thus, husband and wife being defendants, the husband, without obtaining an order for the wife to answer separately, puts in a separate answer, stating that his wife did not live with him, and that he had no influence over her; and being taken into custody on an attachment for want of his wife's answer, the court ordered him to be discharged, and the wife to

(a) Eyles v. Le Gros, 9 Ves.
12.

(b) Hind, 98.

(c) Perkins v. Hammond, 1
Dick, 287.

(d) Wy. Pract. Reg. 53.

(e) Lloyd v. Basnet, 1 Dick.
143.

answer separately, and indemnify her husband in respect of costs. (a) And cases may exist where the wife may be attached alone ; (b) as where her husband is out of the realm, and she is sued in respect of a debt on her separate estate, although the process was against her and her husband ; (c) so, if she obstinately refuses to join in defence with her husband, she may be compelled to make a separate defence ; and for that purpose, an order may be obtained, that process may issue against her separately. (d) But if a husband and wife be sued in respect of a demand against the wife, and the husband is a bankrupt, and abroad, and an attachment issues against him for want of an answer, before an attachment will be granted against the wife, an order must be obtained that she should answer separately, and notice of the motion given to her. (e)

If the sheriff does not make his return to the writ of attachment, the court makes an order that he returns it ; then a second order that he returns it within a given time, or stand committed ; after that, a third order that he do stand committed. (f)

(a) *Garey v. Whittingham*,
1 Sim. and Stu. 163.

(b) *Leithly v. Taylor*, 1 Dick.
373.

(c) *Bell v. Hyde*, Pre. Cha.
328.

(d) Mitf. 96. See *Pain*
v. , 1 Cha. Ca. 296.

(e) *Bungan v. Mortimer*, 6
Madd. 278.

(f) See 2 Dick. 557 ; *Harr.*
Cha. Pract. 118.

If an attachment issues, directed to the Chamberlain of Chester, and no return is made to the writ, an order will be made on him, that he should return the writ; and if it appears, on his return, that the sheriff has made no return on the mandate directed to him, the court will order the sheriff to make a return on the mandate within a given time. (a) But *quare*, whether the court will make concurrent orders on the chamberlain and sheriff? (b)

If an attachment has issued upon a *subpoena* in which there is a mistake in the name of the parties, or in the return, or in the form of the writ, the court will discharge the attachment. (c) And if an attachment is sealed against good faith, the court will set it aside. (d) And when an attachment is not issued before a second order for time has been obtained, it is too late to complain of the contempt, which may be said to have existed between the expiration of the first order and the date of the second; and if the plaintiff, from courtesy, declines to issue an attachment, intimating to the defendant, that an attachment will be issued, unless he obtains another order, he puts it on the defendant to take measures for

(a) *Clough v. Cross*, 2 Dick. 555. (c) *Gilb. For. Rom.* 39.
 (b) 1 *Turn. Cha. Pract.* 113. (d) *Barritt v. Barritt*, 3 Swanst. 395.

get it drawn up, and omits to
notice of the order, until the a
the latter cannot set aside
And if an attachment, for war
regularly issued, without an
faith, the court will not set
payment of costs. (c) It is pro
that a party bringing an action
in consequence of having be
attachment, which, on his ap
set aside for irregularity, will
proceeding in it, but without
application, he may be advise
court for compensation. (d) 7
plies where the defendant pros
law in consequence of an irregu
under any other process of th
commission of rebellion. (e)

Attachments must be entered in the register's book; and formerly they were also entered into what is called the house book, (but this last is now disused,) expressing the cause of issuing the attachment. (a) The register is not to enter any attachment which issues from the six clerks' office, without a note under his hand. (b)

SECTION VI.

Attachment with Proclamations.

If the sheriff, to whom the writ of attachment is directed, is not able to take the defendant under it, he returns *non est inventus*; upon which a writ, called an attachment with proclamations, issues against the party, also directed to the same officer, who by it is commanded to cause a proclamation to be made, that the defendant does, upon his allegiance, appear in the Court of Chancery, on a certain day therein named, and nevertheless, in the mean time, to attach the defendant if he can be found. To obtain this writ, the attachment, with a return of *non est inventus* endorsed thereon, must be left with the clerk in court, who will thereupon make out the writ in question, and leave it with the bag-bearer in the

(a) Harr. Cha. Pract. Edit. 1808, p. 117. (b) Beames' Cha. Ord. 100.

six clerks' office to be sealed ; it must be entered with the register in the same manner as an attachment.

After contempt duly prosecuted to an attachment with proclamations returned, no commission to answer shall be made, nor any plea or demurrer admitted, but upon motion in court, and affidavit made of the party's inability to travel, or other matter to satisfy the court touching that delay. (a)

Gilbert, in his *For. Rom.*, (b) says, the reason why, upon the first contempt on the attachment, they allow a commission to issue, or a plea or demurrer to be put in, is because it does not appear to be an affected delay, and therefore, upon tendering the costs of the attachment, the defendant may take his commission, and upon like tender, the plea and demurrer are to be received. But if there regularly issues an attachment with proclamations, the defendant cannot of course purge his contempt by a mere tender, but he must apply to the court to show that his plea and demurrer are proper, and to exhibit a proper excuse for his delay, that the court may see that there is no further likelihood of delay by the plea or demurrer put in, or by the commission to answer granted.

(a) Beames' *Cha. Ord.* 178.

(b) *P.* 71.

But it seems that the court, in some of the cases referred to in the last section, did not make this distinction between a contempt on the first attachment, and a contempt on an attachment with proclamations. But a defendant against whom an attachment with proclamations issues, may put in a plea and answer, if the writ has not been returned; but cannot do so, if the writ has been returned. (a)

SECTION VII.

Commission of Rebellion.

Upon the return of the writ of proclamations, that proclamation has been made, and of *non est inventus*, a commission of rebellion issues against the defendant. This is a writ under the great seal of Great Britain, directed generally to special commissioners, commonly four or more, named by the plaintiff, commanding them to attach the defendant, wheresoever he shall be found in Great Britain, as a rebel and contemner of the law, so as to have him in chancery on a certain day therein named.

This writ, it seems, may be executed on a Sunday; but such a practice ought to be avoided,

(a) *Waters v. Chambers*, 1 Sim. and Stu. 225.

Commission of Rebellion.

cept in cases of evident necessity. Though on an attachment with proclamations, the sheriff cannot justify breaking the doors in executing such process; yet the commissioners, in executing the writ of rebellion, may, it seems, use that force, if it be necessary to apprehend the defendant; as they are directed to attach him as a rebel and contemner of the laws.

The commissioners, having taken the defendant, have a discretionary power to take bail for the defendant's appearance on the return day of the writ; but if bail is not given, it is the duty of the commissioners to bring up the defendant

SECTION VIII.

Serjeant at Arms.

Upon the return of *non est inventus*, upon a commission of rebellion, the next process is serjeant at arms, whose duty it is, though he be an officer of the House of Lords, by himself, or his deputies, who are called messengers, to execute all warrants against any person after he has stood out a commission of rebellion. This process is generally obtained upon motion, (a) with the commission of rebellion, and return indorsed on the motion paper, but may be, upon petition, (b) and the counsel moving for it, must immediately, in court, deliver to the register the commission of rebellion; and, if required, name the clerk in court, that the serjeant may know where the party in contempt lives. When the order for a serjeant at arms is drawn up by the register, it is to be delivered, not to the party applying for it, but to the serjeant at arms, or his deputy, it having been found that it frequently happened that the party having drawn up the order, would not take a warrant out on it, but would make use of it as the means to force the party prosecuted into some composition, to the great prejudice of the serjeant's

(a) *Gilb. For. Rem.* 77.(b) *Londonderry v. Cornwallis*, 1 *Dick.* 285.

Serjeant at Arms.

ployment. (a) And no order for a serjeant at arms, drawn up and passed by the register, is to be charged, or the contempt thereon, without the serjeant's fees being paid to him, and a certificate under his hand, testifying the same. (b) After the writ has been delivered to the serjeant, or his deputy, he procures a writ, or warrant thereon, issued by the Lord Chancellor. If the party, against whom this process issues, be taken upon it, he is to be brought to the bar of the court to answer the contempt of which he has been guilty. Upon payment, or tender of costs of the contempt, and entering his appearance, or putting in answer, as the case may be, he is entitled to

his answer after such erroneous process has issued, the court will then rectify such mistake. (a)

It may not be amiss here to observe, that in the 7th Geo. I. disputes had arisen between the serjeant at arms and the warden of the Fleet, touching the execution of the process of the court; the serjeant complaining that the court had of late, for contemnors not appearing to be examined on accounts before the Master, not producing writings, and other contempts, granted orders of commitment, without issuing the process against them; and that the court of late frequently gave the defendants further time to answer on entering their appearances with the register, and that thereupon, for not answering at the time limited, orders of commitment had been granted; and the said several orders of commitment had been executed by the warden of the Fleet, or else he had returned *non est inventus*, upon which sequestration had been obtained; by which means the process of the court was rarely carried on by the serjeant at arms; it was therefore ordered that no sequestration can regularly issue to sequester the estate of any person who cannot be found, but upon the return *non est inventus* of the serjeant at arms; and where any person was in contempt, either for want of appearance, or answer, or for not yielding

(a) *Bennett v. Button*, 1 Dick. 136.

SECTION IX

Sequestration

Upon the return of *non est* in
jeant at arms ; or if the defen
taken on any of the former proc
persists in his contempt, a se
against him. (b) This process
tained, as the first process, agai
defendant, after an attachment,
custody either in that or any c
defendant is not in custody of
Fleet, but in some other custody

grounding an order for a sequestration; (a) but if the defendant be already in the custody of the warden of the Fleet, the court will grant a sequestration against the defendant immediately. (b)

This process is obtained upon motion, and not upon petition. (c) And in case it is moved for upon the return of the serjeant at arms, the counsel who moves for this writ, has the warrant to the serjeant at arms, with the return on it, in his hand; the supposition of the law is, that the prior process is filed before the subsequent process issues. (d)

The courts of common law appear formerly to have been of opinion, that courts of equity had no authority to issue this process; for, in 41 Eliz. it was held by the Court of King's Bench, that if a man be sued in a court of conscience, and will not obey, his body is to be imprisoned, and no commission ought to be awarded for the taking of his goods. (e) And it appears to have been ruled, that if a man killed a sequestrator in the execution of such process, it was no murder. (f) It is said that sequestrations were first introduced in Lord Bacon's

(a) *Bowes v. Strathmore*, 2 Dick. 711.

(b) *Errington v. Ward*, 8 Ves. 314.

(c) *Beam. Cha. Ord.* 215.

(d) *Floyd v. Mangel*, 3 Atk. 569.

(e) *Brograve v. Watts*, 1 Cro. Eliz. 651.

(f) *Gilb.* 78.

The writ of sequestration is issued by the Court of Chancery, and more commissioners, empowered into the defendant's real estate into their own hands, not only but also all his goods, chattels whatsoever, and to keep the defendant has fully answered his take in the title of the order for may be rectified after the writ is executed. (b)

Whether the commissioners as mesne process is directed, or the extensive words used in action, is a point which has been argued. But it should seem, upon the w

(a) Arguments of Counsel, (c)
in *Hyde v. Pettit*, 1 Cha. Ca. 437

action is not properly the subject of a sequestration. It has been decided, that the dividends of bank stock, *(a)* and the salary of an equerry to one of the royal family, *(b)* cannot be sequestered; neither will the court, upon motion, order a person, not party to the cause, to pay into court the arrears of an annuity granted by him to a defendant, against whom a sequestration had issued from want of an answer, unless the grantor, by his conduct, has waived the objections to the jurisdiction. *(c)* The commissioners are not justified in seizing the books and papers of a corporation. *(d)* It seems that this writ, as mesne process, cannot be executed farther than by the sequestrators taking possession; they ought, however, to keep the defendant really, and not nominally, out of possession. *(e)* And it seems that sequestrators may justify breaking locks, *(f)* if keys are denied to them. *(g)* There are many instances where, upon application to have goods sold, taken under this mesne process, the court has re-

(a) *M'Carthy v. Goold*, Ball and Beatt. 387. See also *Francklyn v. Colhoun*, 1 Ball and Beatt. 276.

(b) *Fenton v. Lowther*, 1 Cox, 315.

(c) *Johnson v. Chippindale*, 2 Sim. 55.

(d) *Lowten v. the Mayor of Colchester*, 2 Mer. 395.

(e) *Hales v. Shaftoe*, 1 Ves. J. 86.

(f) *Lowten v. the Mayor of Colchester*, 2 Mer. 397.

(g) *Pelham v. Newcastle*, 3 Swanst. 290, in note.

fused to direct it to be done, (a) unless it be to pay the sequestrators' expenses. (b) If, however, the goods are of a perishable nature, the court may be, perhaps, disposed to order the sale of them; (c) and, under a sequestration, a landlord is entitled to be paid arrears of rent; and if the facts are not disputed, the court will make the order without sending the case to the Master. (d) In *Rowley v. Ridley*, (e) an application was made to the lords commissioners for an order for tenants of estates; taken under a sequestration, as mesne process, to attorn; the commissioners not having decided the question, the motion was revived before Lord Thurlow, who was again appointed Lord Chancellor, upon the seals being delivered up by the lords commissioners. His lordship, upon being informed by counsel that Lord Commissioner Ashhurst thought the motion ought to be granted, made the order; but afterwards, upon the plaintiff's moving that the tenants might stand committed for not obeying the order, his lordship

(a) *Wilcocks v. Wilcocks*, Amb. 421. *Hales v. Shaftoe*, 3 Bro. C. C. 72. *Knight v. Young*, 2 Ves. and Bea. 184. Vide also *Simmonds v. Kinnard*, 4 Ves. 735, and the cases cited by the Solicitor General in that case.

(b) See *Hales v. Shaftoe*, 1 Ves. J. 86.

(c) *Shaw v. Wright*, 3 Ves. 23; sed vide Amb. 421.

(d) *Dixton v. Smith*, 1 Swanst. 457.

(e) 2 Dick. 622.

said that the sequestration was in mesne process, and refused the motion. And the court will not make an order that the sequestrators should be at liberty to grant leases. (a)

If the sequestrators are forcibly dispossessed, an order will be made by the court to restore them; (b) and the court will restrain a party from proceeding at law against them. (c)

The costs attending the suing out this writ are taxed by the Master; and sometimes the sequestrators are allowed poundage, and sometimes a gross sum. (d) But the court will not make an order on a plaintiff to pay a sequestrator his fees, who has made no return of the goods sequestered, but has delivered them over many years since, and made no demand upon the plaintiff since. (e)

This process may, with the other processes which have been mentioned, be discharged upon the defendant's clearing his contempt, and paying the costs incurred by it. But if the bill has been taken *pro confesso ad computandum*, the court will

(a) *Bray v. Hooker*, 2 Dick. 638. *Kay v. —*, 3 Swanst. 306.

(b) *Pelham v. Newcastle*, 3 Swanst. 289, in note.

(c) *Haye v. Cunningham* 5 Madd. 406.

(d) *Hind*, 104. *Wood v. Freeman*, 2 Atk. 541.

(e) *Hawkins v. Crook*, 3 Atk. 593.

Sequestration.

discharge the sequestration, on paying the costs of the contempt only, but will keep it on foot, as a security to the plaintiffs for the defendant's appearing before the Master to take the account. (a)

It is also to be observed, that this process, issuing *ex parte* process, abates, or is at an end, by the death of the party in contempt, it being considered a personal process only. (b)

Though it is a general rule, that the process of sequestration cannot be resorted to, till the process of *ex parte* at arms has been found to be ineffectual, yet there is an exception to this rule in

upon affidavit of serving him with a letter missive, petition, copy of the bill and *subpœna*, and in the case of a member of the House of Commons, upon affidavit of service of *subpœna*, the court will first (a) grant an order *nisi* for a sequestration, *i. e.* an order for that process, unless the defendant, being personally served with that order, shall, within eight days, show good cause to the contrary; and if he still persists in his contempt, then, upon affidavit of the service of the order *nisi*, the court, upon motion, after the eight days are expired, will make that order absolute. If the defendant cannot be found, to be served personally with the order *nisi*, service on his clerk in court will be ordered to be good service. (b) If the sequestration *nisi* be for want of an answer, and the defendant puts in an answer before the order is made absolute, and exceptions are taken to this answer, the court will enlarge the time for showing cause, till it shall appear whether the answer is sufficient or not. (c) However, the course of the court seems formerly to have been to consider an answer, though insufficient, as cause against making the rule absolute, and to put the plaintiff to the necessity of suing out a new sequestration *nisi*; (d) but Lord Hardwicke lays down the rule as above

(a) *Bernal v. Marq. Donegal*,
11 Ves. 43.

(b) *Marq. of Lothian v. Gar-*
forth, 5 Ves. 113.

(c) *Butler v. Rashfield*, 3
Atk. 739.

(d) *Lord Clifford's Case*, 2
P. W. 385.

Sequestration.

ed, as the proper medium between paying no attention to an answer excepted to as insufficient, considering it in the same light as an answer objected to. (a) So likewise if the warden of the court be in contempt for not answering, a sequestration is the first process against him, the former processes against his person being unnecessary, as he is supposed to be always personally present in court. (b) Also a sequestration *nisi* is the first process against a sworn clerk for not answering; formerly the practice was to suspend him from office. (c)

In concluding this section, it is fit to add, that if

SECTION X.

Distringas.

In the case of a corporation aggregate, against whom an attachment does not lie, a writ, called a *distringas*, is the first process after these defendants have refused to appear to, and answer, the bill. It is a writ issuing out of the Court of Chancery, directed to the sheriff, commanding him to distrain the land, goods, and chattels, of the corporation, so that they may not possess them till the court shall make other order to the contrary ; and that, in the mean time, the sheriff is to answer to the court for what he distrains, so that the defendants may be compelled to appear in Chancery, and answer the contempt.

If the execution of this writ does not procure the obedience of the corporation to the process of the court, after the sheriff has made a return of what he has levied, an *alias distringas* may be obtained ; and if, after that, the corporation still continue disobedient, a *pluries distringas*. There must be fifteen days between the teste and the return of each of these writs. If the last-mentioned

Habeas Corpus.

ringas fail of effect, a sequestration upon the *pluries distringas* returned by the sheriff, may be maintained against the corporation; which sequestration cannot be discharged till the corporation have performed what they are enjoined to do, and pay the costs of the several *distringases*; and of the sequestration, including the commissioners' fees; but upon their doing this, they may, upon application, get the sequestration discharged.

Upon the first writ the sheriff generally levies by shillings "issues," upon the *alias distringas* by pounds, on the *pluries distringas* he levies the whole property. (a)

may appear or answer, and clear his contempts. It is likewise often procured by the plaintiff to remove the defendant into the custody of the Fleet, from some other custody, in order to have the bill taken against him *pro confesso* for not answering; or to have a sequestration against him for not obeying a decree; (a) and he may be brought up, in the latter case, while in custody under sentence for a misdemeanour. (b) And if the defendant is in confinement under a sentence for forgery, he may be brought up on this writ, upon an attachment for want of an answer. (c) But if the plaintiff's object in thus wishing to remove the defendant be, not in order to take the bill *pro confesso* against him, but merely to charge him in custody, that, when the cause of his confinement is at an end, he may not be released till he has made the discovery sought for, that object may be obtained merely by leaving the attachment with the sheriff. (d) If the defendant is in custody upon mesne process, or in execution, he is removed by a *habeas corpus cum causis*, to be turned over to the warden of the Fleet, where he is to remain, charged with the several matters, with which he stood charged in the prison from whence he was re-

(a) Vide post.

and Bea. 78; *sed vide* Rogers

(b) *Hales v. Shafto*, 2 Dick.

v. Kirkpatrick, 3 Ves. 573.

711.

(d) *Johnson v. Aylet*, 2

(c) *Moss v. Brown*, 1 Ves.

Dick. 658.

Habeas Corpus.

ved. (a) But if he is confined for a misdemeanour or felony, and brought up for not obeying a decree, he is turned over to the Fleet *procurator*, for the purpose of grounding an order for requestration against him, and from thence he is to be carried back to the prison from whence he came with his cause. (b)

The writ is obtained either upon motion or petition; but commonly upon motion; and is directed to the warden of the Fleet, marshal of the King's Bench prison, sheriff, or other person, in whose custody the defendant is, to bring into court his body, at the return of the writ; and the

on a day certain ; but there is no limited time between the teste and the return ; nor between the return of one writ and the issuing of another : as a separate order must be had for each writ, it is convenient to make the return in term time, or on a seal day, when the succeeding process may be immediately moved for, if the prior one be not obeyed. This process is served by delivering the writ itself, under seal, to the warden, or other person in whose custody the defendant is detained, and keeping a copy thereof.

If the sheriff, after having received this writ, discharges the defendant before he has cleared his contempts, the court will make an order *nisi* for a commitment of that officer for a contempt, which it will afterwards make absolute, if good cause is not shown. (a)

SECTION XII.

Taking Bills Pro Confesso.

If the defendant has appeared, and afterwards wilfully refuses to answer, and stands out all the

(a) *Kendal v. Barron*, 1 Dick. 89.

Taking Bills Pro Confesso.

processes of contempt ; or if, being in the custody of the Fleet upon any of those processes, or in any other suit, or being in any other prison under the process, or in execution, obstinately refuses answer, the bill may be taken against him *pro confesso*. But if he is in the latter custody, he must first be removed from thence into the Fleet *habeas corpus*. (a) But an attachment must be issued, if he is in custody on another suit, and it is not necessary to wait for the return.

Although a sequestration against a defendant not answering has been executed, and his goods, or real estates, seized under it, still the

has not appeared, ordered that an appearance should be entered for him, pursuant to the statute of 5 Geo. II. c. 25. (a) If the defendant should, on being remanded to the Fleet, in order to prevent his being brought up by *alias pluries*, remove himself back to the King's Bench prison, the court will order, that if he does not answer by the time an *alias pluries* would have issued, the bill to be taken *pro confesso*. (b)

The writ of *alias habeas corpus* does not issue, except to the prison of the court; therefore a decree *pro confesso* cannot be obtained against a defendant in confinement under a criminal sentence, for when brought up he is not turned over to the Fleet, *cum causis*, as in a civil case, but he must be returned immediately. (c)

A bill may be taken *pro confesso*, though an answer is put in, if it is reported insufficient, it being then as no answer; (d) or, although there is a demurrer to the bill, which is overruled, (e) or though there is a sufficient answer to the bill, if the bill is afterwards amended, but no answer

(a) See Hind, 110.

(d) 4 Vin. Abr. 446; 2 Atk.

(b) Pendergrast v. Saubergne, 2 Dick. 535; Sturges v. Brown, 2 Mer. 511.

24; Attorney General v. Young, 3 Ves. 209. Sed vide Hawkins v. Crook, 2 P. W. 556.

(c) Moss v. Brown, 1 Ves. and B. 306. See 2 Dick. 535.

(e) Harr. Cha. Pract, 1808, p. 154.

Taking Bills Pro Confesso.

put in to the amendments; in which case the bill will be taken *pro confesso* generally, and not to the amendments only, the record being correct; (a) and to prevent this decree, not only must the answer be put upon the file, but a receipt must be taken for the costs; if it is not, a motion should be made, that the answer should be taken off the file for irregularity. (b) But this motion will not be granted, if the plaintiff has taken an office copy of the answer. (c)

If there be only one defendant, and he is in custody, the bill may be taken *pro confesso* upon motion, the clerk in court attending with the

ificate from the six clerk of that fact, and that he is still in contempt. If it appears that the defendant went armed, to prevent the process from being served on him, so that the sheriff's officer could not, without danger, execute them, this will be considered as equivalent to absconding. (a) However, this order for setting down the cause for taking the bill *pro confesso*, may be afterwards discharged by the defendant on a reasonable ground of indulgence, if the delay has not been extravagantly long, and upon payment of costs; (b) but not merely on payment of costs, and an offer to put in an answer, without stating what answer is intended to be put in, particularly where the defendant has resisted process two years, (c) nor on merely putting in an answer. (d) If, however, the plaintiff accepts the answer, it is a waiver of the process; (e) after the cause has been set down, in order to obtain the decree *pro confesso*, it may be advanced on motion. (f)

The decree for taking the bill *pro confesso* is pronounced by the court, the plaintiff not being

(a) *Davis v. Davis*, 2 Atk. 81.

(b) *Williams v. Thompson*, 2 Bro. C. C. 279 and 280.

(c) *Hearne v. Ogilvie*, 11 Ves. 77.

(d) *Williams v. Thompson*, 2 Bro. C. C. 279.

(e) *Hearne v. Ogilvie*, 11 Ves. 77.

(f) *Hart v. Ashton*, 1 Madd. 175; *Bolton v. Glassford*, there cited.

Taking Bills Pro Confesso.

tled to take such decree as he can abide by; as
the case of default of the defendant at the
ring. (a)

This decree, when made in the ordinary course,
or appearance, is just the same as any other
decree of the court, and cannot be impeached
collaterally, but only upon a bill of review, or a
bill to set it aside for fraud. (b) Under a decree
made upon taking a bill *pro confesso*
against a defendant who has appeared, but has
not answered, he cannot attend the Master with-
out leave of the court: but leave to attend will be
given, and the sequestration discharged, upon

an order fixing a day for his appearance, a copy of which is to be inserted in the Gazette, and published in the parish church of the defendant, and posted in the public places in the statute mentioned; and if the defendant does not appear within the time limited by the order, the court may order that the plaintiff's bill be taken *pro confesso*, and make such decree as shall be thought just, and issue process to compel the performance of it; and the court may order the plaintiff to be paid his demands out of the estate sequestered, according to the decree, the plaintiff giving security to abide such order touching the restitution of the estate, as the court shall make upon the defendant's appearance; but in case such plaintiff shall refuse to give security, then to remain under the direction of the court, until the defendant appears to defend such suit. And if the defendant be brought into court upon *habeas corpus*, and shall refuse to enter his appearance, the court may enter it for him, and such proceeding may be thereupon had, as if the party had actually appeared. Persons out of the realm, or absconding in manner aforesaid, at the time such decree is pronounced, if they become publicly visible within seven years after the decree, shall be served with a copy of the decree, and in case of death, their heirs, &c. If persons so served with a copy of such decree shall not, within six months of such service, petition for a rehearing of

Taking Bills Pro Confesso.

cause, the decree to be absolutely confirmed, bar all claiming by them ; but a defendant, within six months after such service, or not being served, within seven years after such decree, on petitioning for rehearing, and giving security for costs, is to be admitted to answer, and the cause heard again ; the act not to affect persons beyond seas, unless it shall appear by affidavit that such persons had been in England within two years before the *subpœna* issued.

If the minister of the parish prevents the order for the defendant's appearance from being published, the minister is indictable for a con-

necessity of his being brought into court by *habeas corpus*, in order that appearance might be entered for him upon his refusal, but the plaintiff must proceed in the method pointed out by the above statute. (a) It is proper also to observe, that where the bill is sought to be taken *pro confesso* against an absconding defendant, there must be an affidavit, according to the requisition of the eighth section, that the defendant had been in England within two years before the *sub-pœna* issued; merely stating in the affidavit that the defendant was abroad, and that he absconded to avoid being served with process, is not sufficient. (b) It seems also that it is not sufficient for the party, who makes an affidavit of the defendant's absconding, to say that he was informed and believed that the defendant went abroad to avoid being served with the process of the court; the affidavit must state by whom the party deposing received such information. (c)

This statute extends to bills of revivor, although there appears for some time to have been a doubt whether it did. (d) It seems that a decree *pro confesso*, under this statute, may be opened upon evidence of the derangement of the defend-

(a) Anon. 3 Atk. 690.

(c) Barnard, 401 and 403.

(b) Neale v. Morris, 5 Ves.

(d) Anon. 3 Atk. 690.

1. Sed vide Anon. 2 Ves. 188.

Taking Bills Pro Confesso.

; but his own affidavit of that fact is not
sufficient. (a)

But with respect to persons having privilege of
parliament, bills may be (by a late act of par-
liament) (b) taken *pro confesso* against them,
if they have stood out to the return of process
of sequestration against them for enforcing an
appearance, without the necessity of showing that
the defendant absconds to avoid the process of
court; that statute enacting, that upon pro-
ving the return of such sequestration, the court
may, on the motion or other application of the
plaintiff, appoint a clerk in court to enter an

confesso, and the court shall make such order, *unless* the defendant shall, within eight days, on being served with such order, show good cause to the contrary ; and after the said order has been pronounced, the bill shall be read in any court of law, as evidence of the facts therein contained, in the same manner as if admitted to be true by the answer. This section of the act, according to the case of *Jones v. Davis*, (a) decided by Lord Eldon, is confined to bills for a discovery only. But in a subsequent case of *Logan v. Grant*, (b) before Sir Thomas Plomer, V. C., his honour decided that this section was not confined to bills of discovery only, but extended to bills praying relief, observing that there must be some misapprehension of what the Lord Chancellor had said. (c)

SECTION XIII.

Contempts.

HAVING considered the several processes of contempt distinctly, I shall now make some observations on contempts in general. Whether a libel be public or private, the only method to proceed is at law, this court having no jurisdiction

(a) 17 Ves. 363.

(b) 2 Madd. 626.

(c) *Cory v. Gertcken*; 2 Madd.

43.

Contempts.

ess it be a contempt. (a) There are three
s of contempts ; one kind of contempt is scan-
sing the court itself. There may be likewise
contempt of this court by arresting, and acting
ariously towards, persons who are under the im-
iate prosecution of the court. There may be
contempts by attempting to obstruct the
se of justice to be administered by the
rt. (b)

nder the first class, are comprehended those
tempts which are committed before the court
f ; such as insults offered to the judge ; or in-
ruption of the judicial proceedings ; beating

Thus, if a plaintiff is arrested in going to put in his answer, (a) or in his return from attending a motion against him in the cause, (b) or on his return from his examination before the Master, (c) or from attending an arbitrator under an order of the court, (d) the court will, on examining the parties personally, and not by affidavit, discharge them from the arrest, and subsequent detainers in other actions. (e) If a witness, going to make an affidavit before a Master, is arrested, this court will discharge him. (f) A person also attending a commission of bankruptcy without summons, swearing that he was a material witness, and not contradicted, will be protected from arrest while remaining, though having left the room by order for a separate examination. (g) The court will order him to be discharged immediately, in the first instance. Application at the bar, by the party, without petition, is the proper form; and the court will not give time to answer the affidavit. (h) A solicitor likewise, on his returning from attending his clients' business in court, (i) or

(a) 1. Cha. Rep. 217. 7 Ves. 314.

(b) Bromley v. Holland, 5 Ves. 2. Harr. Cha. 158.

(c) Sidgier v. Birth, 9 V. 69.

(d) Moore v. Booth, 3 Ves. 350.

(e) Bromley v. Holland, 5 Ves. 2.

(f) Per Lord Eldon, in List's case, 2 Ves. and B. 374.

(g) Ex-parte, Byne, 1 Ves. and B. 316.

(h) Ibid. 324.

(i) Gascoygne's case, 14 Ves. 183.

Contempts.

attending the Master's office, (a) is protected from arrest; and may be discharged therefrom after a *viva voce* examination of himself, and the person arrested, taken on oath before the Lord Chancellor, or a Judge sitting in bankruptcy; the Chancellor or Judge himself administering the oath, in consequence of the absence of the register. (b) Although, where contempt is not wilful, the court will not punish the party making the arrest, yet it is a rule that a person arrested, who ought not to have been arrested, is entitled to be discharged at the expense of the person who arrested him. (c)

With respect to alleged deviations, perhaps the

sary refreshment as this ought not to be looked upon as a deviation, so as to cancel the defendant's privilege *redeundo*. (a) So where a witness, having attended a trial at Winchester assizes, which were over on Friday, about four in the afternoon, was arrested about seven on Saturday evening, as she was going home in a coach to Portsmouth; the court held, she ought to be discharged, her protection not being expired, and that a little deviation, or loitering, would not alter it. (b) In the case of *Sidgier v. Birch*, (c) the defendant, who was preparing to put in his examination before the Master, finding it necessary to see a deed in the hands of a hostile party, but in the presence of his (the defendant's) solicitor, engaged to meet his solicitor at three o'clock; though the defendant was punctual, the solicitor did not come till five o'clock, when it was too late to finish the business: the defendant was returning home to Hampstead to look after other papers, when he was arrested in Holborn; Lord Chancellor Eldon discharged the defendant; his lordship, after alluding to the cases of stopping to take refreshment, and necessary deviations, as to look to account books, said, that the question in these cases always is, whether the man was *boná fide* engaged in the business he was called upon to execute;

(a) 2 Black, 1113.

(c) 9 Ves. 69.

(b) Gilb. Cas. K. B. 308.

Contempts.

that he should be very unwilling to apply that principle, where the party has not been examined, to hold that he might travel about a fortnight to provide information. To these cases it may be proper to add, that although a father has an undoubted right to the guardianship of his children, and if he can in any way gain them, he is at liberty so to do, provided no breach of the peace be made in such attempt; yet they must not be taken away by him, in returning from, or coming to this court; and it will be a contempt in any person offering to do so. (a)

The wards of the Court of Chancery are under

brought to the attention of the court by the guardian, or next friend, who files the bill above alluded to. All parties above referred to, together with the parson who performs the ceremony, (if he is within the jurisdiction,) will be ordered into court. (a) But if the clergyman does not appear to have been at all concerned in the contrivance of this wrongful act, and is ignorant of the fact, that the party was a ward of the court, he is not guilty of a contempt; (b) and being entirely exculpated, will be discharged, with costs out of the infant's estate. (c) As a peer is not liable to commitment for a contempt, the court has ordered a sequestration *nisi*, in the first instance, against him, in marrying of a ward. (d) An abortive endeavour to marry a ward of the court, is a contempt. (e) The punishment of the contempt will of course depend upon the circumstances; and it is competent to the court not to confine itself to a *commitment* for a contempt, but, in a case calling for a severer punishment, to direct prosecutions of various kinds; in some instances for a conspiracy; in others, for another offence of another description. (f) In one case, the principal contriver of

(a) Herbert's case, 3 P. W. 115.

(d) Eyre v. Shaftesbury, 2 P. W. 109.

(b) More v. More, 2 Atk. 58.

(e) Warter v. Yorke, 19 Ves. 451.

(c) Warter v. Yorke, 19 Ves. 451.

(f) Ball v. Coutts, 1 Ves. and B. 297.

Contempts.

marriage, a magistrate, and a barrister, was, under the circumstances (the ward, who possessed a large fortune, having been married to a watchmaker), committed for the contempt, dis-barred, and struck out of the commission of the peace; and the husband was also committed for a contempt. (a) In another case, where the marriage ward of the court had been effected by the husband, falsely swearing that she was of age, though only fourteen years, and she evidently appeared under age, the clergyman was reprimanded accordingly, and the husband was committed, with a direction that he should be prosecuted; and was accordingly indicted for a misdemeanour,

mit of his living within the rules. But there are several of Lord Hardwicke's orders, committing the party to close confinement. (*a*) And even the personal attendance in the court, of the husband, has been dispensed with, where he could not attend without difficulty, and commitment would be the cause of serious injury to him in his profession, as a military officer, and upon an offer to execute a proper settlement, to be approved of by the Master. (*b*) But the court will not discharge the husband until a settlement is made; (*c*) but in a case, where the husband was in the army, he was discharged, upon an undertaking to lay proposals before the Master; (*d*) and, in a subsequent case, upon the authority of *Stackpole v. Beaumont*, he was discharged, upon an undertaking to execute a settlement, although the same circumstance did not occur. (*e*)

The court directs a reference to enquire, if the parties have or have not contracted a valid marriage, and to receive proposals for a settlement. (*f*) Lord Eldon, in the case of *Ball v. Coutts*, observes,

(*a*) See *Bathurst v. Murray*, 8 Ves. 79.

(*b*) *Green v. Pritzer*. Ambl. 602.

(*c*) *Bathurst v. Murray*, 8 Ves. 79. *Millet v. Rouse*, 7 Ves. 419.

(*d*) *Stackpole v. Beaumont*, 3 Ves. 92.

(*e*) *Winch v. James*, 4 Ves. 386-7.

(*f*) *Warter v. Yorke*, 19 Ves. 454.

Contempts.

if a beggar marries a ward of the court for sake of the fortune, the court has been in the habit of not permitting him to touch that fortune which was his object ; but it has never gone to the length, that if this species of indiscretion has occurred, which the court must punish by commitment, but which brings persons together of equal rank and fortune, and as considerable a settlement is made by one as by the other, no attention is to be given to an equivalent provision to be made by the husband for the wife and issue. In *Rich v. James*,^(a) the whole of the wife's fortune was settled to the separate use of the wife for life, and a power to settle the interest of a moiety of

countant General, where it would be safe, and that a trust should be declared for the separate use of the wife for life, to be paid to her from time to time, and not by way of anticipation, during her life; after her decease, the capital to go among the children of this or any other marriage; and if she dies without issue, in the life of the husband, then according to her appointment by will, and in default of appointment, to her next of kin. In this case, the court refused to give the husband his *costs*; but the costs of all other parties to come out of the fund. But in the *subsequent* case of *Bathurst v. Murray*, (a) the husband was treated with greater indulgence; the wife's property was 800*l.* a-year; the husband was allowed to have 150*l.* a-year, during the coverture, with a power to the wife by will, to increase this annuity to 300*l.*; but in case of her death, in the life of her husband, above twenty-one, without issue and without appointment, her property to go to her next of kin, exclusive of her husband. Lord Eldon observed, that there could not be much expectation of happiness, where the husband had nothing, and the wife had the absolute control over the property. In the case of *Chas-sing v. Parsonage*, (b) where the conduct of the husband was attended with aggravating circumstances, the court refused to direct that, out of the

(a) 8 Ves. 78.

(b) 5 Ves. 15.

Contempts.

emulation of the wife's property, the debts of husband should be paid, though alleged by to have been contracted in supporting his and family.

The third head of Contempts, is the attempt to obstruct the justice of the court. Thus, to insert advertisements in the public journals, that ever shall discover and make good, legal proof of the marriage in question in this court, shall be 100%. reward, as it tends to the suborning of witnesses, is not only criminal, but a contempt of court, being the means of preventing justice in a cause depending. (a) To attempt likewise to

contempt of the same nature, may be mentioned the case of a printer of a journal, who had published a libel in one of his journals, against the Commissioners of Charitable Uses, acting at a particular place, calling his advertisement "a hue and cry after a commission of charitable uses;" the court committed him. (a) As an additional ground for the court's interference in this sort of case, Lord Hardwicke considered persons concerned in the business of a court, as being under its protection. (b) A similar contempt to the three last, is attempting to prejudice mankind, and consequently the court, with regard to the merits of a cause before it was heard; thus, it would be a contempt for a party in a cause to print and publish his brief before the cause came on to be heard. (c) It seems that it is illegal to publish part of a depending cause. (d)

It has been seen that in many of the contempts above referred to, the mode of proceeding is by applying to the court that the contemptuous persons may be committed. According to Lord Clarendon's orders, (e) where oath is made of beating the party serving the process or orders of the court, (but without saying by how many wit-

(a) 2 Atk. 471.

(b) *Ibid.*

(c) 2 Atk. 471.

(d) *Deacon v. Deacon*, 2 Russell, 607.

(e) *Beam. Cha.* 204.

Contempts.

ses,) or where an affidavit by two witnesses is
le, of the scandalous or contemptuous words
inst the court, or its process, the party offend-
is to be committed upon motion, without any
her examination. But it seems that the fact
he beating to warrant this very summary pro-
ding, must be proved by two witnesses, as well
he other sort of contempts; for Lord Hard-
ke, in a case before him, where not only
temptuous language was used respecting the
cess of the court, but the person serving it
severely beaten, as the offence was proved
y by one witness, that judge would make a
only for the person complained against to

All processes of contempt, are to be made out in the county where the party prosecuted is resident, unless he shall be in or about London, when it may be made out in the county where he then is. (a) In those cases, where the party is not committed in the first instance, after the party is brought in, or appeared *gratis*, the prosecutor, upon notice thereof, files interrogatories for his examination; and the court will hasten the filing of them, and order them to be filed within four days, or the party be discharged. (b) And this practice seems formerly to have prevailed in ordinary contempts, as well as when they consist of contumelious expressions against the process of the court, as for not appearing and answering. (c) And after appearance and interrogatories filed, the party is not to depart before he is examined, without leave of the court. (d) But if a contempt is prosecuted against one who is unable to travel, or against many persons, who are servants and workmen, who live afar off, a commission may be had to examine them. (e) If the party prosecuted for a contempt, denies it on his examination, or it does not clearly appear by his examination, the prosecutor may, if necessary, take out a commis-

(a) Beam. Cha. Ord. 61 and 199. well's Commissioners. Beam. Cha. Ord. 200, in note.

(b) Wy. Pract. Reg. 136. (c) Wy. Pract. Reg. 137.

See the Orders of Oliver Crom- (d) Beam. Cha. Ord. 200.

(e) Ibid. 203.

Contempts.

of course, to prove the contempt ; the party prosecuted may cross-examine witnesses, and, on leave of the court, examine witnesses of his own. (a) After these proceedings, the court will decide whether a contempt has been committed or not, or will sometimes refer it to a Master, to certify whether the contempt be confessed or denied, or not ; in which case the Master, in his certificate thereof made to the court, is likewise to assess and certify the costs to either party, as may be cause, without other order or motion to that purpose. (b)

(a) Beam. Cha. Ord. 202.

(b) Ibid. 203.

CHAPTER III.

PROCEEDINGS BY DEFENDANT PREVIOUS TO, AND
THE MODE OF PUTTING IN, HIS DEFENCE.

By whom a Suit may be Defended ; Appearance ; Reference of a Bill for Scandal and Impertinence ; Demurrer ; Plea ; Answer ; Disclaimer.

SECTION I.

By whom a Suit may be Defended.

WHEN the interest of the crown, or of those whose rights are under its particular protection, as charities, is concerned in the defence of the suit, the King's Attorney General, or, during the vacancy of that office, the Solicitor General, must be made a defendant. And the Queen's Attorney or Solicitor seems to be necessary to defend her. (a) But these officers of the crown, are not subject to the same rules as a common defendant.

(a) Mitf. 93, 94.

By whom a Suit may be Defended.

ill against the Attorney General, instead of
g process against him, it prays that he may
r it, upon his being served with an office
of the bill. The plaintiff must accordingly
re this to be done, at the same time that
fficer is attended with a *subpæna*. If the
ey General declines to appear or to answer,
ocess issues against him for a contempt, (a)
ill the court make any order on him to
. (b) But there are instances in the Court
chequer, where the Attorney General,
r delayed to put in his answer beyond a
able time, the court appointed a short day
m to answer the bill, or, in default, that it

Bodies politic and corporate, and persons of full age, not being married women, nor idiots, nor lunatics, defend a suit by themselves. A married woman generally defends a suit jointly with her husband ; but there are cases, where by leave of the court, she may defend a suit separately from her husband, and without the protection of another. Thus, if she claims an interest in the subject matter of the suit, in opposition to the husband,(a) or if she cannot in conscience consent to the answer drawn up by the husband,(b) the court will make an order that she should be allowed to defend the suit separately from her husband ; but she must first obtain this order ; without it, her answer will be suppressed.(c) However, in a case where her answer was deliberately put in by her, without her husband's consent, and was replied to, the court refused to set it aside for want of such order.(d) But where a husband and wife join in a suit as plaintiffs, or answer as co-defendants, it is to be considered as the suit or defence of the husband alone, and that it will not prejudice a future claim by the wife in respect of her separate interest.(e) And if the husband brings a bill against his wife, it is admitting she is a *feme sole*, and she must put in an answer as

(a) Mitf. 95. *Wyburn v. Chandos v. Talbot*, 2 Blount, 1 Dick 155. P. W. 370.

(b) *Ex-parte Halsam*, 2 Atk. 49. (e) *Hughea v. Evans*, 1 Sim.

(c) Mitf. 95, note. and Stu. 185, 188.

By whom a Suit may be Defended.

known to the clerk at the public office, when answer is sworn by the guardian. (a)

o, if a person is by age or infirmity in a state of incapacity, and only a formal party, he may be defended by a guardian. (b) But when it is disputed whether a defendant is, from infirmity of mind, incompetent to answer, it will be referred to the jury, to enquire as to the fact. (c)

If a bill is brought against a lunatic or idiot, requiring him to be found such by inquisition, it is of course to apply to the court to assign a guardian to defend the suit. But if the bill

ject matter of the suit. If the infant resides within twenty miles of London, the guardian is appointed by the court; for which purpose, the infant, and the person intended to be appointed guardian, personally attend the court; when such person, if no well-founded objection is made to him, is appointed guardian to the infant to defend the suit. If the infant resides above twenty miles from London, the guardian is appointed by commission, under which any two of the persons, to whom the commission is directed, upon having the infant personally produced before them, may appoint a proper person to be his guardian for the above purpose, which appointment they certify to the Lord Chancellor. 'There is a case where the father of the infant, who resided abroad, was assigned his guardian, to take his answer, on motion without commission, the plaintiff consenting; (a) but in another subsequent case, when the same sort of motion was made, the court said a commission must go. (b) But the court will dispense with the presence of the infant, and appoint a guardian, upon an affidavit of the infant's inability from illness to travel. (c) The order for appointing the guardian, must be entered, served

(a) *Jongsma v. Pfiel*, 9 Ves. 357.

(c) *Hill v. Smith*, 1 Madd. 290.

(b) *Jappen v. Norman*, 11 Ves. 563.

SECTION II.

Appearance.

seems formerly to have been the practice with the court, when a defendant, for want of appearance, was taken, and brought in upon attachment, for non-appearance, commission of rebellion, or by the court at arms, to require him to enter his appearance with the register, (a) consenting that a warrant at arms should go after him for his contempt, in case he should not comply with the order of the court with respect to the time of an-

if he lives above twenty miles, the cause is called a country cause. The defendant, in the first case, if he has been served four days, excluding the day of service, before the return of the *subpœna* has time to appear until the return day; but if served on the return day, or a day or two before, then four clear days after the service; so, if the defendant resides in the country, and is served on the return day, then eight days after the return day; but if he has been served eight clear days before, he must appear on the return day of the *subpœna*; and if served within eight days before the return day, then he has eight clear days from the time of service to appear in. (a) But when the *subpœna* is made returnable the last day of the term, the defendant is at liberty to appear the first return of the term following. (b) If the *subpœna* be returnable immediately, and the defendant is served within ten miles of London (the distance to which the writ is restricted), the defendant must appear within four days, exclusive of the day of service. (c) We have seen that, by the 1st of the general orders of 1828, a *subpœna* returnable immediately, may be obtained as well in a country, as in a town cause; but such *subpœna* in a country cause is to be without prejudice to the defendant's right to eight days time to enter his appearance

(a) 1 Turn. Pract. 110 and 111. Wy. Pract. Reg. 36. Beam. Cha. Ord. 169. (b) Wy. Pract. Reg. 36. (c) 1 Turn. Pract. 111.

Appearance.

service of *subpæna*. No clerk in court is to any attachment, but upon affidavit of service *subpæna*, (a)

course to be taken by the defendant to his appearance, is either by himself or his or, to employ a clerk in court to appear for who, thereupon, has a recourse to the general-book, in order to ascertain the name of the plaintiff's clerk in court. The defendant's clerk then leaves with the plaintiff's clerk in a note in writing, informing the latter of defendant's appearance, which is then entered; which the defendant's clerk in court goes

in court appearing for another defendant, applies to the plaintiff's clerk in court to know what clerk in court appeared for the first-named defendant; and an application is accordingly made to that clerk in court for the bill, and an office copy is made of it.

If the husband and wife are served with a *sub-pœna*, the husband must appear for both; (a) but if the wife should appear, and appear alone, her appearance is not absolutely void, but the irregularity may be waived by her applying for an order to answer separately. (b)

Where an infant is defendant, he appears by his guardian.

SECTION III.

Reference of Bill for Scandal and Impertinence.

The defendant, after he has appeared to the bill, is to take an office copy of it, and to lay a brief of it before counsel. If the bill, upon inspection, is found to contain scandalous or impertinent matter, the defendant is entitled to have the same expunged. (c) Counsel drawing and

(a) Wy. Pract. Reg. 37. Orders. Beam. Cha. Ord. 25.
Cary 35. 92. 1st of Lord Coventry's Orders.

(b) *Travers v. Buckle*, 1 Ves. 386. Ibid. 70. Lord Clarendon's

(c) 56th of Lord Bacon's Orders. Ibid. 167.

Reference of Bill for Scandal, &c.

ing impertinent pleadings, is liable, according to the orders cited below, to pay costs of copy, and may be further punished as the case shall merit. (a) A bill which is not relevant to the object of the cause is impertinent; but if it be relevant, it will not be considered as scandalous, and the degree of relevancy is not material. (b) Thus, if a bill is filed to remove a trustee, it is not scandalous or impertinent to impute to him any corrupt or improper motive in the execution of his trust; but it is impertinent, and may be scandalous, to state any circumstances as evidence of general malice. (c) It is not impertinence in a bill to state, by way of amendment, part of the answer, or sentence of the defendant, and to interpose to an

quence of this order, the clerk in court, who filed the record, attends with it before the Master, who strikes his pen through the offensive or impertinent words, setting his initials against the part so expunged. But if the Master reports that the bill is not scandalous or impertinent, the party procuring the reference, pays the costs of it. (a) If either party be dissatisfied with the Master's report, he may except to it, in order to have the opinion of the court on the point in dispute; a mode of proceeding which will be mentioned in a subsequent chapter. A bill cannot be referred for impertinence after answer, or even after submitting to answer, as by praying for time. (b) But it may be referred for scandal at any time, (c) in order to preserve the purity of the records of the court.

SECTION IV.

Demurrer.

If the bill is free from the objectionable matter mentioned in the last section, the counsel before whom a brief of the office copy of it (which is made by the clerk in court for the defendant) is laid, will advise the defendant, whether he is to demur or plead to the bill, or to answer it, as the case may require. If the defendant's mode of de-

(a) Lord Clarendon's Ord. Ferrar v. Ferrar, 1 Dick, 173, Beam. Cha. Ord. 167. Anon. 5 Ves. 656.

(b) Anon. 2 Ves. 631. (c) Ibid.

Demurrer.

He rests on the bill, and on the foundation of
what is there apparent, and demands the judgment
of the court, whether the suit shall proceed at all,
it is termed a demurrer; if, on the foundation of
new matter offered, it demands the judgment of
the court, whether the defendant shall be com-
pelled to answer further, it is termed a plea; if it
limits to answer generally the charges in the
bill, and demands the judgment of the court on
the whole case, made on both sides, it is called
a general answer. (a) But a defendant may de-
murrer to part of the bill, plead as to other part, and
answer as to the residue; and he may put in se-
parate demurrers to separate and distinct parts of

but, although the defendant may, as of course, obtain orders for further time to plead or answer, yet such indulgence is not allowed to a demurrer, where the party intends to demur to the whole bill; the terms of the order for time generally being that the defendant should have a further time to answer, plead, or demur, not demurring alone; as it is supposed that the defendant may, upon advice of counsel, upon sight of the bill only, be able to demur to it. (a) But under such an order, he may put in an answer and demurrer; and although he puts in a very evasive answer, he will be considered as having complied with the terms of the order; (b) but not so, if he merely denies combination. (c) If a defendant has obtained an order for time to answer only, he cannot put in a demurrer alone, (d) nor answer and demurrer; (e) and where a defendant, after having had an order for time to plead, answer, and demur, not demurring alone, and a subsequent peremptory order for three weeks further time to answer, files a demurrer and answer, the court will order both to be taken off the file; (f) although the

(a) Beam. Cha. Ord. 172.

Taylor v. Milner, 10 Ves. 447.

(b) Tomkin v. Lethbridge, 9 Ves. 179.

(c) Lansdown v. Elderton, 8 Ves. 526; Lee v. Pascoe, 2 Bro. C. C. 78.

(d) Dyson v. Benson, Coop.

110; Kenrick v. Clayton, 2

Bro. C. C. 214, 2 Dick. 685; Bruce v. Allen, 1 Madd. 556.

(e) Taylor v. Milner, 10 Ves. 444.

(f) Mann v. King, 18 Ves. 297.

Demurrer.

etice seems formerly to have been to overrule demurrer, and to let the answer stand. But course has been departed from, because, by ruling the demurrer, it is admitted that it was regularly filed. (a) A demurrer is not taken off the file by the mere pronouncing of the order for that purpose; therefore it is irregular for the defendant to file a plea and answer before the demurrer is actually taken off the file. (b) A demurrer may be taken off the file, though the ordinary time for answering has expired, provided it is filed before process of contempt issued. (c) But it seems that a defendant who has answered an injunction bill, having suffered the injunction to go against him, upon a *dedimus*, the

But the court has permitted the defendant to demur, even after he has stood out all process of contempt to a sequestration. (a) But the special circumstances are not stated in the report, under which this indulgence was given. And it is material to state, that the court will not, after an order has been obtained for time to answer only, give leave to the defendant to demur, unless under special circumstances, as surprise; it not being sufficient to show on the merits of the case, that a demurrer was proper. (b)

A demurrer must be signed by counsel; but is put in without oath, as it asserts no fact, and relies merely upon matter apparent upon the face of the bill.

After the draft of demurrer has been settled and signed, it is then fairly engrossed upon parchment, and carried to the defendant's clerk in court to be filed; and within eight days (which mean office days) (c) after filing, it must be entered with the register in order to be argued. An order of the 9th July, 1689, (d) directs that pleas and demurrers, &c., shall not be entered,

(a) *Harvey v. Matthews*, 1 444; *Dodder v. Huntingfield*,
Dick. 30. 11 Ves. 283.

(b) *Bruce v. Aston*, 1 Madd. (c) *Bullock v. Edington*, 1
556; *Taylor v. Milner*, 10 Ves. Sim. 481.

(d) *Beam. Cha. Ord.* 286.

Demurrer.

about a certificate first had of the filing of the demurrer, and plea. But it is said, in d's Cha. Pract., 222, that such a certificate is, the present practice, not required; no deposit requisite; if the demurrer is not entered within above time, it is overruled, of course, (a) and plaintiff may take out process for forty shillings costs, and to put in a better answer; but demurrer, having been regularly entered with register, either side may set it down to be tried, having previously obtained an order for that purpose, by petition to the Lord Chancellor; the order for setting down the demurrer for trial, must be brought to the register at least

ers and pleas which tend to discharge the suit shall be heard first upon every day of orders, that the subject may know, whether he shall need further attendance or not.

If the demurrer, on argument in court, be overruled, the defendant pays the taxed costs occasioned thereby to the plaintiff; but if it be allowed, the plaintiff pays the taxed costs to the defendant. (a) The bill is then, if the demurrer is to the whole of it, out of court; to avoid this, the court has sometimes, instead of deciding upon the demurrer, given the plaintiff leave to amend his bill, paying the costs incurred by the defendant; (b) and even after a bill has been dismissed by order, it is in the discretion of the court to set the cause on foot again. (c) But if the defendant thinks that the demurrer cannot be supported, the court will permit him to withdraw it, on payment of costs to be taxed; and with leave of the court, after a demurrer to the whole bill has been overruled, he may put in a demurrer less extended. (d) It is proper to add, that if the cause of demurrer assigned on the record is not good, the defendant may, at the bar, *ore tenus*, assign other cause; (e)

(a) 31st and 32d of the general orders of 1828. See Post Title "Costs."

(b) Mitf. 174.

(c) Baker v. Mellish, 11 Ves. 72.

(d) Ibid. 68.

(e) Durdant v. Redman, 1 Vern. 78. Tourton v. Flower, 3 P. W. 370.

Plea.

he cannot thus demur upon a ground, which has not made the subject of demurrer on the record; as if the demurrer be for a discovery, he cannot, *ore tenus*, demur to the examination of witnesses *de bene esse*, (a) and much less shall he be allowed to demur at the bar, when he has only pleaded, and there is no demurrer in court. (b) If a demurrer is struck out of the paper for want of appearance, it cannot be again set down without order, which may now be obtained by motion, though formerly such order could only be obtained upon petition. (c)

SECTION V.

a commission to take the plea, with the same time to return the commission, as is applicable to answers : also, if he has obtained the order for time to plead, answer, or demur, or to answer alone, (a) he is at liberty to put in a plea to the whole bill within the time given. And it will be sufficient here to say, that the same rules which are to be attended to in obtaining orders for time by defendants to put in their answers, and with respect to the signature of them, the naming of commissioners to take them in the country, and the mode of executing the commission, apply likewise to a plea when put in upon oath. But it may be proper here to observe, that when the defendant is to be sworn to his answer and plea before commissioners in the country, it ought to appear distinctly by the caption, that the defendant was sworn to the plea as well as the answer ; otherwise the plea will be rejected : (b) but the court will sometimes permit the caption to be amended. (c) If it be taken without oath, where it ought to be taken on oath, it is not one of those irregularities which can be waived by the plaintiff's taking a step in the cause, so as to prevent it from being taken off the file. (d)

(a) *Roberts v. Hartley*, 1 Bro. C. C. 57.

(c) *Gilb. For. Rom.* 94.

(d) *Wall v. Stubbs*, 2 Ves.

(b) *Anon. Cha. Ca.* 108. and *Beam.* 354.
Gilb. For. Rom. 94.

Plea.

All pleas are to be signed by counsel, except those which are taken by commission in the country; these do not require the signature of counsel; (a) but it is not necessary that all pleas should be put in upon oath; only pleas in bar of matters in *pari* must be on oath; but pleas to the jurisdiction of the court, or to the disability of the person of the plaintiff or defendant, or pleas in abatement of any matter of record, or of matters recorded or as of record in the court itself, or any other matter, need not be upon oath; (b) thus a plea that the plaintiff was convicted of felony may be without oath. (c) But a plea of the statute of *bracery* buying of titles with the necessary averments

pleas, the plaintiff ought to procure a reference to a Master, to certify the truth thereof; and such reference, and the report thereon, in the case of the dependency of a former suit for the same matter, ought to be procured within a month, (a) otherwise the bill stands dismissed; (b) and if in any of these cases the Master reports the fact true, the bill stands instantly dismissed, unless the court otherwise orders, (c) and the plaintiff pays five pounds to the defendant. (d) But the Master's report may be excepted to, and the matter brought on to be argued before the court. If either of the four above-mentioned pleas be, in the opinion of the plaintiff, defective in point of form, or otherwise, independent of the mere truth of the fact pleaded, he may set down the plea to be argued, as in cases of plea in general, (e) the plaintiff having entered the plea with the register, which it is his duty to do. (f) In the case of outlawry, if the plaintiff conceives that it is insufficient in form, it must be entered by him within eight days after filing of it, otherwise the defendant may take out process for five pounds costs. (g)

(a) Lord Clarendon's Ord.

Beam. Cha. Ord. 177. Baker

v. Bird, 2 Ves. J. 672.

(b) Wy. Pract. Reg. 329.

(c) Mitf. 243.

(d) Beam. Cha. Ord. 177.

(e) Mitf. 243.

(f) Wy. Pract. Reg. 326,
330.

(g) Beam. Cha. Ord. 175.

Plea.

but (subject to the above exception) it is the duty of the defendant (a) to enter his plea with the register within eight days from the filing of it, it having been ordered by the court (b) that all such pleas as are grounded upon the substance and merits of the matter, or extend to the jurisdiction of the court, shall be determined in open court, and for that purpose the defendant is to enter the plea with the register, within eight days after the filing thereof, or in default thereof, the same shall be allowed of course as put in for delay, and the plaintiff may then take out process to enforce the defendant to make a better answer, and pay costs of five pounds, and then the plea shall not after-

affidavit of his having been served with an order to set down the plea, be overruled; and if no such affidavit is produced, the plea will be struck out of the paper, and it will not be restored unless an affidavit is made by the solicitor, accounting for his not being prepared, when the plea was called on. (a)

If the plea is allowed upon argument, or the plaintiff thinks it, though good in form and substance, not true in point of fact, (in which latter case, there seems no use in setting down the plea for argument,) he may take issue upon it; whereupon the defendant must make proof of the truth of his plea by depositions, as in case of an answer. If he fails in that proof, so that at the hearing of the cause the plea is held to be no bar, the plaintiff is not to lose the benefit of his discovery sought by the bill; but the court will order the defendant to be examined upon interrogatories to supply the defect. (b) But if the defendant proves the truth of the matter pleaded, the suit, so far as the plea extends, is barred. (c)

If a plaintiff replies to a plea, before it comes on to be argued, this is as full an admission of the

(a) *Mazarredo v. Maitland*,
2 Madd. 38.

(b) *Mitf.* 240.
(c) *Ibid.* 241.

Plea.

goodness of the plea, in point of form, as if it had been argued and allowed. (a)

If on argument the plea is allowed, the plaintiff pays the taxed costs. (b) But if commissioners of the country send up a plea of outlawry, in discredibility, the defendant shall have no costs, although the plea be allowed, for it might have been put in without such commission, and the plaintiff was subjected to the unnecessary charge of attending the commission. (c) The suit is not at an end by allowance of plea ; for the plaintiff, if he disputes the truth of the fact contained in the plea, may (as we have seen) take issue upon it.

ground of defence seems to be sufficient, the court will, at the time it overrules the plea, give liberty to amend it. (a) But the court always expects to be told precisely what the amendment is to be, and how the slip happened, before they allow the amendment to take place. (b) The defendant may, if he thinks his plea cannot be supported, obtain leave to withdraw his plea, and plead *de novo* within a short period. (c)

Until the plea has been argued, there can be no motion for an injunction ; but the court will at the instance of the plaintiff, speed the arguing of the plea, and will give leave that if the plea should be overruled, the plaintiff may move at the same time for an injunction. (d) And the same rule holds with respect to a demurrer. If, upon argument, the benefit of a plea is saved to the hearing, it is considered that, so far as it appears to the court, it is a full defence ; but that there may be matter disclosed in evidence which would avoid it, supposing the matter pleaded to be strictly true ; and the court will not, therefore, preclude the question. When a plea is ordered to stand for an answer, it

(a) *Newman v. Wallis*, 2 Bro. C. C. 147. *Dobson v. Leadbeater*, 13 Ves. 231. (c) *Nobkissen v. Hastings*, 2 Ves. J. 87.

(b) *Newman v. Wallis*, 2 Bro. C. C. 147. *Wood v. Strickland*, 2 Ves. and B. 150. (d) *Humphreys v. Humphreys*, 3 P. W. 395. 2 Atk. 113.

Plea.

erely determined that it contains matter which
be a defence, or part of a defence, but that it
not a full defence, or it has been uniformly
red by way of plea, or it has not been properly
ported by an answer, so that the truth of it is
btful; for if a plea requires an answer to sup-
t it, upon argument of the plea the answer
y be read to counterprove the plea; and if the
endant appears not to have sufficiently sup-
ted his plea by his answer, the plea must be
rruled. If a plea is ordered to stand for an
wer, it is allowed to be a sufficient answer to
much of the bill as it covers, (a) unless by the
er, liberty is given to except. (b) But that
rty may be qualified so as to protect the de-

SECTION VI.

Answer.

If the defendant is advised, that the bill is not the subject of demurrer or plea, or, although it may be so, that there is no occasion to resort to these modes of defence, he must prepare to put in his answer. A defendant, in all cases, by the course of the court, has eight days, exclusive of the day of appearance, to answer the plaintiff's bill. Although a defendant appears before the day on which he is bound to appear, the eight days are reckoned from the day of his appearance. (a) If the defendant's appearance be time enough within the term, rule may be given him to answer within that period; but if no rule be given, he is at liberty to answer at any time within the term. (b) If the defendant does not put in his answer within the above-mentioned period, and does not obtain further time to answer, the plaintiff may proceed against him for a contempt, except in the case of a plaintiff in a cross bill,

(a) *Hanwarst v. Welleter*, 5 Mad. 422. See *Webster v. Threlfull*, 1 Sim. and Stua. 137, in note. (b) *Wy. Pract. Reg.* 15. *Harv. Cha. Pract.* 164. *Gilb. For. Rom.* 89.

Answer.

ing in contempt for not answering the original ; in which case he cannot compel the defend- in the cross suit, to put in his answer to it, il he himself, that is, the plaintiff in the cross , but defendant in the original suit, has wvered the original bill. (a) This is the privi- e of the plaintiff in the original suit, in right of bill having been first on the file ; and where original cause is a country cause, and the cross se a town cause, the same right of priority ob- s, as where both causes are of the same cription ; and the plaintiff in the original suit s not waive his priority by taking out orders time to answer in the cross suit. (b) If, how- he amends his bill in a material point, after

for time. (a) If an original suit abates, and a cross bill is filed before it is revived, the priority of suit is lost. (b) In order to stay proceedings on the original bill until answer to the cross bill, an order must be obtained to stay such proceedings. (c)

If a defendant in a bill of revivor does not answer within eight days after appearance, the suit may be revived without answer, by an order made upon motion, as a matter of course on the plaintiff's application; and if the bill of revivor is filed after decree, and the plaintiff neglects to obtain the order to revive, the defendant may do so, having answered. (d)

If the defendant lives within twenty miles of London, his answer is to be taken before a Master in Chancery, but if the defendant lives above twenty miles from London, he may obtain an order for a commission to take his answer in the country; though this commission formerly was not granted but upon oath of the defendant's inability to travel, or some other special cause, (e) it is now granted as upon motion of course. If the defendant, residing

(a) *Johnson v. Freer*, 2 Cox, 371.

(b) *Smart v. Floyer*, 1 Dick, 260. Sed vide Mitf. 89.

(c) *Noel v. King*, 2 Mad. 392.

(d) *Gordon v. Bertram*, 2 Mer. 154.

(e) *Wy. Pract. Reg.* 112.

Answer.

in twenty miles of London, be incapable, from
physical infirmity, of attending to swear to his answer
in person, usually the master at the public office, or
in his absence, one of the other masters sometimes,
attend the defendant to take his answer, ac-
companied by the clerk from that office. However,
the defendant may obtain a *commission* to take his
answer, though he lives within twenty miles of
London, upon a proper affidavit that the defendant
is ill, and unable to travel to London. (*a*)

Formerly the *dedimus* had a shorter or longer
return, according to the distance of the party
from London; but generally if the *subpœna*
returnable the first return of Easter or Michaelmas.

the usual orders for time, which he obtains of course, depends upon the residence of the defendant; if he resides within twenty miles of London, the court makes an order, upon the first application, for one month; upon the second application, for three weeks; and upon the third application, for a fortnight. But if the defendant usually resides above twenty miles from London, which is a country cause, he is entitled to an order for six weeks upon the first application, one month upon the second, and three weeks upon the third; and this in all cases, whether he comes to town and swears his answer at the public office, (which he may do if he pleases,) or whether he obtains a commission to take his answer in the country. It has been before observed, that the usual order obtained on these occasions, is to plead answer or demur, not demurring alone; but if the defendant has obtained an order for time to answer alone, upon the counsel's instructions, the court will not permit it to be corrected by extending it to the usual order. (a) An order for time beyond the usual extent of time granted, may be obtained under special circumstances, and that without first obtaining the usual order. (b) It seems that if the ground is special, and in its nature such that the defendant or his agents could be apprised of it in

(a) *Phillips v. Gibbons*, 1
Ves. and B. 184.

(b) *Norris v. Kennedy*, 12
Ves. 66.

Answer.

e, the application should be as early as possible; but in the nature of things, bodily infirmity, which may not be foreseen, must be excepted. The great length of the bill is an auxiliary circumstance; (a) and in a case of doubtful practice, a further time has been allowed upon terms. (b) In general, a defendant upon a bill of revivor is entered to these three orders for time, as upon an original bill. (c) But if a defendant, in a suit by plaintiffs in common, has had all the time he is entitled to, and has got into contempt, the death of one plaintiff before answer, does not purge that contempt as to all the other plaintiffs, and give a new time to all the orders for time again. (d) But if the defendant to the original bill, which is

The court does not grant the third application for time, without imposing terms on the defendant, which, according to Lord Rosslyn's order, (a) are, that the defendant consents to enter his appearance with the register, by his clerk in court, in four days, consenting that a serjeant at arms should go against him as on a commission of rebellion, returned *non est inventus*, in case he does not put in his answer by the time. And it is also further provided by the same order, that, on a second application for time, to answer an amended bill, or after exceptions allowed, the defendant do consent to the same terms ; but this is not to preclude an application to the court under special circumstances. (b) If a defendant has obtained three orders for time, consenting to a serjeant at arms, and afterwards puts in an answer, which, upon exceptions, is reported to be insufficient, or admitted by himself to be so, by his submitting to put in a further answer ; he is not entitled to any order for time to answer the exceptions ; for it was not the intention of Lord Rosslyn's order, that a defendant, in such a case, should, by putting in an insufficient answer, place himself in the same situation, as if there had been no third application. (c) But a defendant, who has had one order

(a) 4 Bro. C. C. 544. Beam.
Cha. Ord. 455.

(b) Farnsworth v. Yeomans,
2 Mer. 142.

(c) Porter v. De la Court, 8
Ves. 601. See Londonderry
v. Cornthwaite, 1 Dick. 285.

Answer.

time, and afterwards puts in an insufficient answer, and applies for time to answer the exceptions to it, is entitled to the same order as the first, and is not to come in under terms till he applies for a second order to answer the exceptions. (a) It is likewise to be observed, that where an amended bill is considered as standing in the place of a new bill, as if, after a plea to the whole bill, the plaintiff is permitted to amend his bill, on payment of costs, instead of being put to the expense of filing a new bill, the defendant is allowed the same time to answer, as upon an original bill. (b) And after a demurrer overruled, time to answer can be obtained only on special applica-

An order for time must be drawn up, (a) and a copy of it served on the plaintiff's clerk in court; and the original order shown to him at the same time, otherwise it does not stop an attachment. (b) But the production may be waived. (c) And the first order for time ought regularly to be obtained, and served before the eight days for answering are expired; and also such successive orders for further time ought to be obtained, and served before the expiration of the precedent order; for, otherwise, immediately after the expiration of the order for time, the defendant is, in strictness, liable to be attached. A motion for time to answer, if made on the same day on which the attachment is sealed, is irregular; an attachment being considered as issued on the first moment of the day on which it issued; and, therefore, the allegation on such motion, that the defendant is not in contempt, must be considered as untrue. (d) And though the answer is sworn, and left at the public office, to prevent an attachment, it must be actu-

(a) *Gayler v. Fitz-John*, 1 Sim. 386.

(b) *Wallis v. Glynn, Cooper*, 282; 19 Ves. S. C.

(c) *Ibid.* Note. In *Newcombe v. Rawlings*, 3 Madd. 246, a petition for time was answered; but before the order was drawn up, or any notice

given of the petition to the plaintiff, an attachment issued.

The Vice Chancellor said, that a copy of the petition ought to have been served on the plaintiff, and refused to set aside the attachment.

(d) *Stephens v. Neale*, 1 Madd. 550.

ally on the file the evening, at latest, before day on which the application is made. (a) by the courtesy of the office, the plaintiff's clerk in court usually calls upon the defendant's clerk, for an answer, and also gives him notice of an attachment, before any attachment is actually sealed, in order that the latter may give his clerk sufficient notice to procure an order for time; a defendant in a country cause is seldom called upon to answer till the ensuing term. (b)

The usual order for time is, as we have stated before, to plead answer or demur, not demur alone. When this order is applied for by a def

latter case, before the statute of 4 Anne, c. 16, it was not necessary that counsel should sign it; (a) for in earlier times the tenor of the bill was inclosed in, or annexed to, the commission, that the commissioners, who were always barristers, (b) might, as the commission directed, examine the defendant thereon, and take his answer to it; so that the answer of the defendant had in substance that which was equivalent to the signature of counsel. But the statute of 4 Anne, directs that for the future no copy, abstract, or tenor of any bill in equity, shall go with the *dedimus* or commission for taking the defendant's answer; since which statute, the uniform practice of the court has been to require the signature of counsel to an answer taken in the country, which is considered as equivalent to a positive order on the subject. (c)

The answer, after it has been drawn up, must be engrossed on parchment, and *sworn* to by the defendant, except in cases of peers of the realm, who answer upon their honour. (d) And this privilege, since the Union, extends to Irish peers,

answerable for all things therein, either against these orders or any other the orders or rules of the court.

(a) 3 Atk. 439.

(b) *Browne v. Bruce*, 2 Mer. 2.

(c) Ibid. 2 Mer. 1. This was the case of an answer taken in the country.

(d) *Beam. Cha. Ord.* 105, 261.

Answer.

ess they sit in the House of Commons; (*a*) and the case of a Quaker, who answers upon his own affirmation and declaration; (*b*) a Jew is sworn to his answer upon the Pentateuch, and the plaintiff's clerk in court must be present when he swears. (*c*)

The answer of a corporation aggregate is put in under their common seal, and not upon oath; and the clerk, or book-keeper, or secretary, is usually the party; and a want of interest is no objection. (*d*) And if, in the case of a common defendant, an amendment in the title of the answer should be necessary after it has been sworn to, or

The answer must likewise be *signed* by the defendant both in a country and town cause, (a) which is required to identify the instrument, which he has sanctioned by his oath, and more particularly for the purpose of rendering a conviction of perjury more easy. The guardian of an infant defendant, being a co-defendant, and putting in a joint answer, need only sign it once. (b) But under special circumstances, the six clerk has been directed to receive the answer, though not signed by the defendant and of course without oath, upon the plaintiff's consent; as where the defendant went abroad, forgetting to put in his answer, and having left an authority to act for him, (c) or where the defendant was resident abroad, and gave a general power of attorney to defend suits, &c., (d) or where the bill is for a foreclosure, and the defendant, an officer in the army, had sailed for India under orders, immediately after appearance, and before he had time to put in his answer, upon the motion of the defendant. (e) And if the defendant is in this country, it is, of course, upon the motion of

(a) Beam. Cha. Ord. 451.
3 Atk. 439. Before the stat.
of 4 and 5 Anne, chap. 16, it
was not necessary that the de-
fendant should sign an answer
taken in the country before com-
missioners. 3 Atk. 439.

(b) Anon. 2 Jac. and Walk.
553.

(c) ——— v. Gwillim, 6
Ves. 285. Bayley v. De-
Walkers, 10 Ves. 441.

(d) Bayley v. De-Walkers,
10 Ves. 441. Harding v. Har-
ding, 12 Ves. 159.

(e) ——— v. Lake, 6 Ves.
171.

Answer.

plaintiff, to order that the defendant should be at liberty to put in his answer without oath or affirmation; but if he is abroad, his consent is required. (a) In a case where the suit appeared to be frivolous and oppressive, the court allowed the defendant, a quaker, to put in his answer without oath or affirmation. (b)

By the general rule of the court, it seems that the signature of a defendant to an answer without oath, should be attested by the defendant's solicitor or by some respectable person, without which it cannot be filed. (c) And where a clerk to a solicitor attested the signature to an answer put in

without interest ; the usual course in such cases, being, for the court to appoint a guardian to take the answer of the defendant without oath. (a)

A foreigner not acquainted with the English language, may put in his answer in his own language ; but then a sworn translation must be filed with it ; (b) for which purpose, an order, as of course, is obtained for an interpreter, who is likewise sworn to convey to the foreigner the language of the oath.

We have already stated, that the defendant is sworn to the truth of his answer, in a town cause, before a master at his public office ; in a country cause, before commissioners appointed for that purpose by the court ; previously to the issuing of the commission, each party names his own commissioners, generally there are two on each side, or two for the one, and only one for the other. The names of the commissioners are to be entered in a book kept for that purpose in the Six Clerks' Office. (c) The defendant's clerk in court usually calls upon the plaintiff's clerk in court, to name his commissioners, upon receiving which, the former proceeds to take out the com-

(a) *Wilson v. Grace*, 14 Ves. 172.

(c) *Beam. Cha. Ord.* 112 and 113.

(b) *Simmonds v. Du Batte*, 3 Bro. C. C. 263.

Answer.

sion; but if the plaintiff's clerk in court
ses to give such names, the defendant may
in an order, calling upon the former to do so
two days, or in default thereof, the defendant
be at liberty to have a commission directed
his own commissioners. If any of the com-
missioners die, and the parties think that the
remaining commissioners are not proper alone to
ecute the commission, the vacancy is supplied
he parties, by one of the clerks in court naming
, and the adverse clerk striking one of them;
an order must then be obtained for a new
mission, with a new commissioner to be added
he others living. If the parties cannot agree

with one of the defendant's commissioners to take the answer, the new commission will be granted to commissioners named by the defendant; and before the party in fault will obtain a second commission, he must give security for the unnecessary costs already incurred by the other party. (a)

The commission, when made and sealed, is sent to the defendant's solicitor in the country, to be executed. If the defendant is resident in some foreign country, it may be sent to some professional person there, to take care, that it may be properly executed; though the foreign country be at war with us, it must there be executed. (b) Six days' notice must be given to the plaintiff's commissioners, named in the label to the commission, of the time and place of executing it; otherwise the plaintiff's commissioners may refuse to execute it. One commissioner attending on each side is sufficient, to take the defendant's answer, but not fewer than two; the commissioners of either party having waited till six in the evening, the notice having been for nine in the morning, may, of themselves, take the answer, though the other commissioners be absent. (c) And it is no objection to a commissioner, that he is under age. (d)

(a) Wy. Pract. Reg. 116.

(c) Wy. Pract. Reg. 116.

(b) ——— v. Romney,

(d) Ibid.

Ambl. 62.

Answer.

The commissioners and defendant being met together, pursuant to the notice, and the defendant reading the answer previously read over to him, one of the commissioners swears the defendant to the truth of the contents of the answer; first asking him, if he has heard the answer read, and whether he exhibits it as his answer to the bill; and the defendant then signs the answer, in the presence of the commissioners. The answer is then annexed to the commission; and the caption, *i. e.* statement of the commissioners, of their swearing the defendant to the answer, and of the time and place of the ceremony, is to be made at the foot of the answer; and if it be the joint and

and a caption thereof written at the foot of the answer, and subscribed by two of the acting commissioners ; the answer and the commission are then folded up together, directed to the defendant's clerk in court, the hands and seals of the commissioners being put on the back of the commission. If one of the commissioners delivers the answer to the clerk in court at his seat, it is accepted without oath ; but if it is sent up by any other person, he is sworn before one of the Masters, that he received the commission from the commissioners, and that it has not been opened or altered since he received it ; but the latter part of the oath has been dispensed with, where the envelope, containing the answer, was, in consequence of its not being properly indorsed by the commissioners, opened by mistake by the defendant's solicitor. (a)

After the answer has been sworn, the defendant's clerk in court enters it in his cause book, and annexes it to the bill, and marks it at the top with the day and year when filed, and subscribes his name at the bottom on the left side, and then files it with his six clerk, of which he informs the plaintiff's clerk in court, who goes into his six clerk's study, (it being, by the defendant's six clerk, transmitted there) and takes it from thence,

(a) *Cox v. Newman*, 2 Ves. and B. 168.

Answer.

marking an entry thereof in the six clerk's book; but if the answer of another defendant to the same bill is filed before, the clerk in court proceeds in the same manner, except that he does not annex the answer to the bill. It may be proper to state, that, previously to the answer being taken by the defendant's clerk in court, the office copy of the bill taken by him is produced to the defendant's six clerk, for the purpose of receiving his signature; and being marked with the official stamp, it becomes an authority for the clerk in court taking the copy, to file the answer of the defendant, for whom the copy was taken. (a)

the commissioners, is not requisite; (a) but if he can conveniently attend, the commission is, not only to appoint a guardian, but also to take the answer of the infant by such guardian; but, otherwise, the commission is merely to assign a guardian, and then the answer, &c. is taken by such guardian, either at the public office in London, or by commission, as the case may require; but, to save expense, it is usual to obtain an order that the guardian may answer without oath, in which case no commission is of course necessary. But in the case of an answer by infants to a supplemental bill, the court allowed, that the guardian who had put in the answer to the original bill, might put in the answer to the supplemental bill, without the necessity of a new commission, the infant still continuing abroad. (b)

After an answer has been put upon the file, the court will not permit the defendant to amend it; although in some cases that indulgence was formerly granted. The course is, to apply for leave to file a supplemental answer, which, under circumstances, the court will permit to be done, (leaving the answer upon the file), (c) upon an

(a) Hind, 242.

(c) *Jenning v. Merton Col-*

(b) *Lushington v. Sewell*, 6 *lege*, 8 Ves. 79.

Madd. 28.

Answer.

avitt stating, that at the time of putting in the original answer, the defendant did not know the circumstances upon which he makes the application, or any other circumstance upon which he ought to have stated the fact otherwise. (a) Thus, in schedules to an answer, there is a material error, which was only discovered in taking the account before the Master after the decree, upon proper affidavit, the defendant will be allowed to amend in a supplemental schedule. (b) It seems, that the court will not, in the mere case of negligence in the defendant or his agent, unless led to it by fraud, permit a supplemental answer to be filed. (c) An answer without oath or attestation

took possession of the purchased property subsequently to the period, when the contract was entered into, moved for liberty to file a supplemental answer, upon an affidavit, stating that he took possession, under the articles of part of the premises only, being in the actual possession of the other party at the date of the contract as tenant, and for three months before ; and that the misstatement arose merely from his not conceiving it material ; the application was refused, unless he would swear that, when he swore to his original answer, he meant to swear to the sense which he now desires to be at liberty to swear to. (a) And it is material to observe, that if a defendant is allowed to correct a mistake by a supplemental answer, he is held strictly to that mistake, and if he does not confine himself to it, the answer will be taken off the file. (b) And leave was given, after replication, to file a supplemental answer to a bill for dower, in order to state a fine and nonclaim, which had been omitted, through the neglect of the defendant's solicitor, in the answer, upon the defendant paying the costs of the application. (c) And in a case, where the defendant desired to file a supplemental answer, the object of which

(a) *Livesey v. Wilson*, 1
Ves. and B. 149.

(c) *Jackson v. Parish*, 1 Sim.
305.

(b) *Strange v. Collins*, 2
Ves. and B. 167.

Answer.

, to admit that defendant was administrator to father, and as such had assets to satisfy the debt in question, which the answer denied, upon affidavit, that he had no recollection of the fact, the time he put the former answer, the motion was granted. (a) If the answer mistakes the plaintiff's name, (b) it is considered as no answer; and will therefore be ordered to be taken off the file with the costs of the motion, by the description of the paper writing purporting to be an answer. If the answer states itself to be an answer "to the bill of complaint of, &c." naming only five complaints, when there were six, (c) or entitled to the joint and several answer of two, but sworn

part illegible, to be taken off the file, if it appears by affidavits, that it was legible when sworn. (*a*)

A further answer, and an answer to an amended bill, are considered as constituting part of the answer to the original bill, and which form but one record. (*b*) And these answers are filed with the same formalities as the first answer.

SECTION VII.

Disclaimer.

If the defendant claims no right or title to the matter in demand by the plaintiff's bill, or any part of it, he may put in a disclaimer, renouncing all claim or pretence of title to such matter. Although a disclaimer, in its strict and simple form, is distinct from an answer, yet it is usually put in under the title of an answer, or together with an answer, and is upon the oath of the defendant. Indeed, it can very rarely happen, that a defendant would be entitled to put in a disclaimer alone ; for although he may not, at the time when he disclaims, have any title or claim to the subject in demand, yet he might have had an

(*a*) *Attorney General v. Town*
7, 3 Swanst. 184.

(*b*) *Hildyard v. Cressy*, 3
Atk. 303.

Disclaimer.

rest in it, which he has disposed of ; it seems, before, that the plaintiff is entitled to an answer from the defendant on that point, in order that, if the defendant has parted with his interest, the plaintiff may know, who is the proper person to make a defendant, instead of the party disclaiming. (a)

It seems that the defendant is not absolutely barred, by his disclaimer, from afterwards insisting upon a claim ; (b) but he must make out a strong case, upon affidavit, to get rid of such disavowal of title ; (c) and a defendant cannot by disclaimer, he has declared

costs. (a) But it is said, that if the plaintiff had probable cause or reason to exhibit his bill, he may, if he pleases, pray a decree against such defendant, and all claiming under him since the bill exhibited, and that it is commonly granted without costs on either side. (b) A defendant who disclaims, may be examined as a witness by a co-defendant. (c) But the plaintiff cannot read his evidence in proof of his own (the plaintiff's) right, to the prejudice of another defendant. (d)

(a) Mitf. 254.

(c) Seton v. Slade, 7 Ves.

(b) Wy. Pract. Reg. 175.

267.

(d) Hill v. Adams, 2 Atk.
39.

CHAPTER IV.

MODES OF PROCEEDING IN INTERLOCUTORY MATTERS.

Motions; Petitions; Affidavits; and Orders.

SECTION I.

serve, with respect to the latter, that as he is not a party seeking the aid of the court, he cannot primarily move for any order for his security; but must file a cross bill. (a) Yet the defendant may sometimes obtain his object, in a case, where the application for an order being made by the plaintiff, the court imposes, as a condition to the relief given to the plaintiff, that he should do what is just towards the defendant; and the court has done this, in a case where the defendant omitted to urge his claim, at the time when the plaintiff made his motion, the defendant having applied to the court speedily afterwards. (b)

A motion is an application *ore tenus* by counsel for an order of the court. (c) A petition is an application by the party, in writing, for the same

(a) Anon. 2 Dick, 778. Micklethwaite v. Moore, 3 Mer. 292. Davers v. Davers, 2 P. W. 410. Pickering v. Rigby, 18 Ves. 401. Wiley v. Pistor, 7 Ves. 411. Princess of Wales v. Lord Liverpool, 1 Swanst. 114.

(b) Wynne v. Griffith, 1 Sim. and Stu. 147.

(c) Note. By the 25th of Lord Coventry's orders, Beam. Cha. Orders, 82, Counsellors

are to be careful, what motions they make, and specially that they move not for things which may be had of course without motion, nor for such things as cannot be granted, as being against the constant rules of the court or common justice, nor yet for such things, as, being granted, serve to little or no purpose; and before they move the court, they be sure to be well-informed and instruct-

Motions and Petitions.

stating the circumstances on which the
of the petition is founded. In general,
ne object may be obtained by either of
modes ; but there are exceptions to this
thus, an order to set down a cause for
directions, or to set down demurrers, pleas,
ceptions, for argument, or to set down a
for an early day, is regularly obtained by
a. (a) And it seems, that motions which
or their object to give effect to orders or
, should be confined to cases, where the
which is to be made on the motion, arises
recent proceedings, and about which there
doubt ; for the adverse party knows nothing

but by the notice, containing only the name of the cause, and the object of the application. (a) Thus, where the application is to have money out of court, and the title depends upon any complicated circumstances, a petition is the proper course; but where the title of it is clear, as where it has been carried to a particular account, the object may be obtained upon *motion*. (b) And it is proper to add, that an order made upon a petition on hearing counsel on both sides, cannot be discharged upon motion; but if made on petition, *ex parte*, it may. (c)

A motion of course is, where, by the rules of the court, the object of it is granted upon asking for it; no notice is necessary of such application, as no opposition will be allowed to it. It is difficult to specify all the motions, which may be made as motions of course, in this court; but it may be useful to instance the most usual, although some of them may have been mentioned in other pages in this book: the ordinary motions for time to answer; motions to amend the bill before answer; to refer pleadings for scandal or impertinence; to refer exceptions to an answer; to refer the

(a) 13 Ves. 393.

(c) Bishop v. Willis, 2 Ves.

(b) Heathcote v. Edwards, 1 113.

Jac. 504. See Anon. 4 Madd.

examination of a party for scandal, impertinence, or insufficiency; for the different processes against a defendant not appearing or answering, where a motion is necessary; for a commission to take the defendant's answer in the country; for a *subpœna* to rejoin, returnable immediately; to refer a solicitor's bill to be taxed; by defendant to dismiss for want of prosecution; by plaintiff, to dismiss on payment of costs; for an order to put the defendant to an election, he suing at law and equity for the same thing, and at the same time; to refer a suit by infant to see if it is for his benefit; to enlarge publication, where the cause has not been set down; for a common injunction for want of

An order, made upon motion of course, may be set aside if obtained upon a false suggestion. Of motions, when they are not of course, but may be opposed, a notice, in writing, signed by the clerk in court, or solicitor, must be given, expressing, shortly, the object of the intended application; and, in general, the court will not extend the order beyond the notice. (a) But notice of motion, by a person suing out in *forma pauperis*, must be signed by the clerk in court. (b) The notice must be served two days before the motion can be made, but before the last general orders, inclusive of the day of service, as a notice served on Tuesday was sufficient for a motion on Thursday following; but service of a notice on Saturday, for a motion on Monday, was not a good notice, as the intervening Sunday was not reckoned a day. (c) But now, by the 22d of the General Orders of 1828, every motion and petition, notice of which is necessary, is to be served two clear days before hearing of such motion and petition. The notice must be served either on the adverse party, personally, or, which is most usual, on his clerk in court; (d) and an affidavit of such

(a) Wy. Pract. Reg. 287.

(b) Gardinerv. ———, 17 Ves. 387.

(c) Harr. Cha. Pract. 1808, p. 465. Maxwell v. Phillips, 6 Ves. 146.

(d) In Gilb. For. Rom. 99, it is said, that this notice ought to be left at the seat of the clerk in court.

Motions and Petitions.

ice should be filed, and a copy of it produced
er the hand of the register of the affidavit
e, or his deputy. The costs of a motion are
given, unless they are mentioned in the no-
of motion. (a) If a party, not interested in
otion, is served with a notice, he is entitled to
costs of appearing. (b) Formerly, if a party
e a notice of motion, which he afterwards
andoned, he was not liable to pay to the other
ty his costs of appearing to oppose the motion;
l a notice of the same motion had been given
ee times, without making it, when the oppo-
party, on a fourth notice, might object to
a motion being heard, until the costs of the

paid for costs. (a) When the court is moved for payment of costs, on account of notice of motion which has been abandoned, such notice must be mentioned to the court, and must also be produced to the register, before he draws up the order. (b)

It is here necessary to observe, that the court will now sometimes do that upon a summary application, which formerly could be done only by a decree at the hearing. Thus, by statute 7 Geo. II. c. 20, it is enacted, that upon a bill of foreclosure, the court, upon application, by the defendant having a right to redeem, and upon admission of the right and title of the plaintiff, may, before the cause shall be brought to a hearing, make such order and decree as the court could have made, if the cause had been regularly brought to a hearing. This act is merely confined to a bill of foreclosure, embracing no other object; (c) and the reference is made upon an admission of the defendant of the amount of the mortgage debt as claimed by the plaintiff. (d) The time of payment may be enlarged on the usual terms, as if there had been a regular decree of foreclosure. (e) But

(a) 1 Swanst. 128.

(d) *Huson v. Hewson*, 4 Ves.

(b) *Withey v. Haigh*, 3 Mad. 105.

437.

(e) *Wakerell v. Delight*, 9

(c) *Bastard v. Clarke*, 7 Ves. 36. *Coop.* 27, S. C.

487; *Præd v. Hill*, 1 Sim. and

Sta. 331.

Motions and Petitions.

defendant cannot obtain this order of reference, or he has stood out all process of contempt, the cause has been set down in the regular course, for the purpose of taking a decree *pro fesso*, (a) or where he does not make the application until the plaintiff, having proceeded against him at law, is entitled to take out execution. (b) The order made under the above act, being a decree, though made upon motion, cannot be discharged upon *motion*. (c) It seems that this act, in relation to foreclosure, gives no new power to courts of equity. (d)

In suits, likewise, for the specific performance of

but a reference will not be directed before the hearing, where the purchaser resists the performance of the agreement on *other* grounds, as upon the latches of the vendor, (a) or on account of misrepresentation, (b) or where the vendor claims an abatement out of the purchase money, (c) or where, the subject of the contract, being a life annuity, the defendant also insisted, that time was of the essence of the contract. (d) But the *other* matter, upon which the defendant resists the performance, must be substantial. (e) It seems that this order of reference to the Master, is, according to strict practice, simply for him to enquire, whether a good title can be made; and that the enquiry as to time, when a good title can be made, if the vendor has such a title, is not directed until it is ascertained, by the Master's report, whether there is a good title, or not. (f) But although, in strictness, it is not regular to make it part of the order, to enquire when a good title was shown, because if the Master be of opinion that no good title was ever shown, that part of the

(a) *Blyth v. Elmhirst*, 1 Ves. and B. 1.

(b) *Paton v. Rogers*, 1 Ves. and B. 351.

(c) ——— v. *Skelton*, 1 Ves. and B. 516.

(d) *Withey v. Cottle*, 1 Turn. 78.

(e) See *Boehm v. Wood*, 1 Jac. and Walk. 421; *Withey v. Cottle*, 1 Turn. 78; *Gordon v. Ball*, 1 Sim. and Stu. 178.

(f) *Gibson v. Clarke*, 2 Ves. and B. 103.

Motions and Petitions.

er is nugatory ; yet, as the addition of those words in the order of inference will, in case Master finds that a good title can be made, the delay and expense of a further order, and further report, it is clearly for the interests of the parties, that these words should be introduced. (a) And so strongly was Sir John Leach, the Chancellor, of that opinion, in *Hyde v. Broughton*, that a reference having been made to title on one motion, his Honour refused a subsequent motion, as to the time when the plaintiff should show a good title ; and observed, that great additional expense and delay are occasioned by parties not asking, in the first instance, where

lor directed a case to be sent) certified that the plaintiff had no interest in the copyright, the bill cannot be dismissed on motion by defendant. (a) It is proper, however, to remark, in order to save unnecessary expense, the court will at any time stop a suit, when a defendant submits to satisfy the plaintiff's just demands. (b)

In *term*, before the Lord Chancellor every Thursday, and before the Vice Chancellor every Friday, except those days happen to be the second day of the beginning, or the last day, save one, of the end of the term, (c) and the first and last days of the term, are days for hearing motions only; and on every day in term, at the rising of the court, after the appropriate business of the day has been disposed of, motions are heard; and at the Rolls, motions of course, or those which are not likely to be attended with much discussion, may be made at the rising of the court. In the *vacation*, motions are made before the Lord Chancellor and Vice Chancellor only on stated days, *i. e.*, on seal days before the Lord Chancellor, and on the day after, before the Vice Chancellor; and at the Rolls only on the morning after term; which is allowed on the supposal that some

(a) *Brooke v. Clarke*, 1 40; *Præd v. Hull*, 1 Sim. and Swanst. 550. Stu. 331.

(b) *Boys v. Ford*, 4 Madd. (c) *Beam. Cha. Ord.* 122.

Motions and Petitions.

might probably remain, which should have
oved, but could not, on the last day of
) And, strictly, no motion can be made at
he brief for which was not put into counsel's
at least on the first day of the seal. (b) When,
ay of those days, the motion comes on to
d, the ground, upon which it is made, is
ed by affidavits, or admissions, of the
arty in the cause, by the Master's report,
ificate, or by orders or decrees of the court,
ase may be.

an order of the 13th December, 1814, every
of motion intended to be made before his

to any motions being made before his Honour the Vice Chancellor, which the Lord Chancellor shall direct to be so made, and also to be without prejudice to the Lord Chancellor's making any orders, upon motions which the Lord Chancellor may think fit to permit to be made before him, although the notice of motion shall have expressed that it was intended to be made before his Honour the Vice Chancellor.

A petition is addressed to the person holding the great seal, or to the Master of the Rolls; and after being ingrossed, is delivered to the secretary of the judge to whom it is addressed, who is to get it answered. If no opposition can, by the rules of the court, be made to it, the object of the application is forthwith granted; and petitions of such descriptions are usually addressed to the Master of the Rolls; as applications by the defendant for further time to answer, which must always state what time the defendant has already had; but if the petition requires examination, or may be opposed, then it is usually ordered, that all parties attend on the next day of petitions. A copy of the petition, thus answered, is then served two clear days before such day, on the opposite party; (a) the material facts in the petition must be supported by the same sort of proofs as those of

(a) See the 22nd of the Gen. Ord. of 1828.

Petitions.

otion. In a petition in the matter of a person
and an idiot, copy of the petition must be served
the Attorney General. (a)

Although, generally, petitions are presented to
court in a cause, yet there are cases, which are
exceptions to the rule. Thus, a guardian may be
appointed to an infant, and maintenance allowed,
on *petition* merely. (b) But Sir Joseph Jekyll
the first judge who went so far in this sum-
y way, as to direct an allowance for mainte-
ce; before his time, the court would do no
e than appoint a guardian in soccage, till the
nt attained the age of fourteen years. (c) The

cept where the property is excessively small; (a) in which case maintenance will be ordered to be paid out of the principal, without the expense of a reference. (b) But where one of three persons, who had been jointly appointed guardians of an infant, had died, the court, without a reference to the Master, appointed the two survivors, guardians of the infant. (c) The court will make this reference to the Master for a guardian, notwithstanding the infant had attained the age of 17, and had, by deed, appointed a guardian for himself. (d) It is proper here to observe, that if the infant is improperly taken away from the guardian, he may obtain the custody of the infant on petition, instead of proceeding by *habeas corpus*. (e)

But if the infant wants a receiver of the rents of his real estate, as well as maintenance, he must file a bill for that purpose; as the court will not appoint a receiver, upon petition, without a bill. (f) In *ex-parte Mountford*, (g) the court made an order for the appointment of a person to act as guardian although the father was living, and for a reference

(a) *Ex-parte Wheeler*, 16 Ves. 266. (d) *Curtis v. Rippon*, 4 Mad. 462.

1 Jac. and Walk. 395. (e) *Wright v. Naylor*, 5 Mad.

(b) *Ex-parte Green*, 1 Jac. 77. (f) *Anon.* 1 Atk. 489. *Ex-*

and Walk. 253. (c) *Hall v. Jones*, 2 Sim. 41. (g) *Whitfield*, 2 Atk. 315.

(g) 15 Ves. 445.

Petitions.

maintenance, on a petition, without suit, but
or a receiver.

In addition to the case above mentioned, an in-
mortgagee, or trustee, may, under the statute
Anne c. 19, be directed to convey, on petition,
without suit. By this act, an infant may be direct-
ed by the Court of Chancery, or Court of Exche-
quer, signified by an order, on the petition of the
infant or persons for whom such infant shall be
seised or possessed in trust, or of the mortgagor,
guardian of such infant, or person, entitled to the
mortgage secured by any lands, &c., whereof any in-
fant shall be seised or possessed by way of mort-

an estate in Ireland, (a) or in the island of St. Christopher's, in the West Indies, (b) are within this statute. The infant heir of an assignee, under a commission of bankruptcy, (c) and of a messenger in bankruptcy, and to whom a provisional assignment had been made, but who had died before the choice of assignees, are within the statute. (d) An infant heir of a mortgagee, although a *feme covert*, may be, under this statute, ordered to convey by fine; but it seems that an affidavit of service of the petition on the husband, is not sufficient, but he must consent to the prayer of it; (e) and an infant devisee in tail of a trust estate, may be ordered, by petition, to convey by common recovery. (f) But this act extends only to plain and express, and not to constructive, or implied, trusts. (g) But an infant, as being the surviving life in an ecclesiastical lease, and taking no beneficial interest under it, has been held to be a trustee within this statute. (h) And the infant trustee is never ordered, under the above act of Anne, upon petition, to convey to another trustee upon trusts to be executed; this must be done by bill, praying to have a new

(a) *Evelyn v. Forster*, 8 Ves. 96.

(b) *Ex-parte Fenniliteau*, 2 Dick. 596.

(c) 1 *Rose*, 310.

(d) *Ex-parte Carter*, 5 Mad. 81.

(e) *Ex-parte Maire*, 3 Atk. 478. *Anon.* 2 Com. 615.

(f) *Ex-parte Johnson*, 3 Atk. 558.

(g) *Goodwyn v. Lister*, 3 P. W. 386.

(h) *Ex-parte Hodgson*, 2 Dick. 737.

Petitions.

tee appointed, and a conveyance, when the infant attains twenty-one years. (a) And a trustee in this act of Parliament must be a naked trustee having no interest. (b) But an infant heir of a mortgagor is a trustee within this statute, notwithstanding he has an interest in the mortgage money, as one of the residuary legatees, being like a co-executor, as the other executor may receive the mortgage money, which puts the former in the character of a dry trustee. (c) And it seems, that an infant trustee, being a trustee for a sale, is not within the statute of Anne, although the persons entitled to the produce of the sale are adult, and so in the petition. (d) It seems that the necessary

for an order that the infant may be directed to convey accordingly; which is made of course; and the court has made this latter order, although the Master has reported, that the infant was not a trustee or mortgagee within this statute, when the court was of opinion that, on the face of the report, the infant was within that act. (a) If the infant refuses to obey the order to convey, the court will make an order upon him that he should convey within a certain time; and if he disobeys that order, an order *nisi* may, on another application, be obtained for his committal. (b)

By 52 Geo. III. c. 32, the Courts of Chancery and Exchequer may, in a cause depending, order dividends belonging to infants, in any of the public stocks, to be paid to the guardian, for maintenance of such infants.

By the statute 4 Geo. II. c. 10, the Lord Chancellor, &c., is empowered, upon petition, to make the same order upon idiots or lunatics, being trustees or mortgagees of lands, &c., or their committee, as the court might make in the case of infant trustees, or mortgagees, under the above statute of 7 Anne. A trustee, within this statute, must also be a trustee without interest, and without any duties, for the simple purpose of part-

(a) *Ex-parte Benton*, 1 Dick. 394. (b) *In the matter of Bech*,
Ex-parte Carter, 2 Dick. 4 Mad. 128.
 609.

Petitions.

th the estate; therefore, a lunatic trustee, a trust deed to sell for payment of debts, himself a creditor, is not a trustee within act. (a) Neither is the lunatic heir of a who has contracted to surrender a copy-estate. (b) Where there is a mortgage, and mortgagee has become a lunatic, the usual is this: the committee presents a petition, g that the mortgagor is willing to pay off the age, and praying a reference; and the costs petition, and of the reference, are paid out lunatic's estate; and the same rule applies, the petition is presented by the mort- (c) A person must be found a lunatic

be standing in the name of any person residing out of England, and such a person has been declared a lunatic, and his personal estate has been vested in any curator, or other person appointed for the management thereof, according to the laws of the place where such person shall reside, the Lord Chancellor may, upon petition, direct the transfer of such stock into the name of the curator, &c. It is likewise enacted, by the statute of 36 Geo. III. c. 90, that if a bankrupt has standing in his own name, in his own right, any stock, transferrable at the Bank of England, the Lord Chancellor, &c., upon the bankrupt's refusing to transfer such stock, may, upon the petition of the assignees, order the Accountant General to transfer stock into the names of the assignees. And, by the same statute, the Lord Chancellor, &c., may order the Accountant General to transfer stock standing in the name of the committee of a lunatic, who has died intestate, or was gone beyond the seas, or has himself become a lunatic, or where it is uncertain whether he is living or dead, into the name of a new committee.

It may be useful also to mention another clause in the above-mentioned act of 36 Geo. III. c. 90; but the reader will observe, that to warrant the interference of the court under that clause, there must be a cause depending. By the first section of that act, if it should happen that any person, in whose name any part of any stocks transferrable at the Bank

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England, is standing, as trustee, or the legal representative of such person being deceased, shall be absent out of the jurisdiction, or be amenable to the process of the Courts of Chancery or Exchequer; or should have become a bankrupt or lunatic; or shall refuse to transfer such stock, &c.; or it should be uncertain, or uncertain, whether such person is living or dead; in such cases, the Courts of Chancery and Exchequer, in any cause there depending, may order the accountant general, or secretary, &c., of the government and company of the Bank of England, to transfer such stock into the name of the accountant general of the Court of Chancery, &c., in trust, in

appeared to rise from weakness of mind. (a) By the 52d Geo. III. c. 158, the benefit of this act is extended to South Sea, and East India, and other stocks, transferrable in the books of such other company. By the 57th Geo. III. c. 39, the benefit of the statutes of 36 Geo. III. c. 90, and 52 Geo. III. c. 158, is extended to petitions to the Court of Chancery in cases of charity and friendly societies, which will be mentioned hereafter.

It is proper here to mention, that by the 6th Geo. IV. c. 74, all the above-recited statutes of 7 Anne, c. 19, 4 Geo. III. c. 16, 4 Geo. II. c. 10, 1 and 2 Geo. IV. c. 114, 36 Geo. III. c. 90, 52 Geo. III. c. 32, 52 Geo. III. c. 158, 57 Geo. III. c. 39, 1 and 2 Geo. IV. c. 15, are for the purpose of having the provisions of the recited acts consolidated and amended, repealed; and by the 2nd section of the said statute, infant trustees or mortgagees of lands or other property, are empowered to convey, by the direction of the Court of Chancery, &c. And by the 3rd section, trustees or mortgagees of land, or other property, being idiots, lunatics, or their committees or persons appointed by virtue of the act, are empowered to convey or assign, by direction of the Lord Chancellor, &c. And by section 4, the Lord Chancellor, &c., may, before inquisition, appoint a person to convey and assign. And by section 5, where trustees and

(a) *Sims v. Naylor*, 4 Ves. 360.

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Mortgagees of land and other property are out of the jurisdiction of the Court of Chancery, &c., if it shall be unknown or uncertain whether they are living or dead, or such persons shall refuse to convey to the persons entitled, or to a new trustee appointed, &c., in such cases the Court of Chancery may appoint persons on the behalf, and in the name of the persons seised or possessed, as aforesaid, to convey and assign. And by the 6th section, where stocks transferrable, as aforesaid, shall be outstanding in the name of trustees and their legal representatives, who shall be idiot or lunatic, the Lord Chancellor, &c., whether such trustees be found idiots or lunatics, or not, may

and also may order the persons appointed, to receive and pay over the dividends. And by section 8, every direction or order, made in pursuance of this act by the Court of Chancery, &c., shall be made upon petition, and of such persons after-named, viz., if the same shall relate to a conveyance or transfer to any persons beneficially entitled thereto, then upon petition of the persons beneficially entitled to the lands, stocks, or property, to be conveyed or transferred; and if the same shall relate to a conveyance or transfer in order to vest any lands or stocks, or property, in new trustees, then upon petition of the trustees in whom the same is to be vested; and if the same shall relate to a conveyance of an estate in mortgage, then upon the petition of the persons entitled to the equity of redemption; or of the persons entitled to the monies thereby secured, or the guardians of the persons entitled to such monies; and infants, or the committees of such persons, if idiots or lunatics. And by the 9th section, infants, idiots, their committees, and persons appointed by the act, may be compelled to convey or transfer in like manner as trustees of full age and sane understanding. And by section 10, the several provisions hereinbefore mentioned, shall extend to cases, in which trustees may have some *beneficial* estate in the property vested in them, and also to cases in which they may *have some duties to perform*. And by section 11, the aforesaid provisions shall extend

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All cases of petition, either in matters of charity, or in matters relating to friendly societies. And by section 12, the Court of Chancery, &c., may, on the petition of the guardians, or next friend, of any infant, in whose name any stocks may be standing, or any sum of money shall be standing, by virtue of any Act of Parliament for paying off such fund, and who shall be beneficially entitled thereto, order the dividends to be paid to the guardian, &c., for the maintenance of the infant. And by section 13, when any stock, &c., shall be standing in the name of idiots or lunatics, who shall be beneficially entitled thereto, or any stock shall be standing in the names of committees of

the transfers, are, the secretary, deputy secretary, or accountant general of the Bank of England. And by the 17th section, the costs may be directed by the Lord Chancellor, &c., to be paid out of the property, in respect of which the orders shall be made.

Also, by statute 29 Geo. II. c. 31, in all cases where an infant, or lunatic, or *feme covert*, is interested in any lease granted by any person or persons, bodies politic, aggregate, or sole, for life or lives, or for any term of years determinable upon the death of any person or persons, it shall and may be lawful for such infant, or his guardian, or for such lunatic, or his guardian, or committee, and for such *feme covert*, or any person on her behalf, to apply to the Court of Chancery, the Court of Exchequer, &c., by petition or motion, in a summary way; and by the order of the court, such respective persons are enabled to surrender such leases, and to accept new leases.

Also, by 33 Geo. III. c. 54, s. 8, (an act for the encouragement and relief of friendly societies,) the treasurer and trustee for the time being, and all other officers of any such society, who shall have or receive any part of the effects of such society, or shall in any manner be entrusted with the custody thereof, or of any securities relating to the same, her and their executors, &c., shall, upon demand

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le in pursuance of any order by such society,
give in his account as therein directed, and
likewise, upon demand, pay over monies in
hands, and assign all securities, &c., standing
in his name, as such societies shall appoint ; and
in case of any neglect or refusal to do any of the
above acts, it is lawful to every such society, in
the name of the treasurer or trustee thereof, to
present a petition to the Court of Chancery, &c.,
and may proceed thereon in a summary way, and
obtain such order therein as to such court shall
be just, and no fee is to be received by
any officer or minister of such court ; and coun-
sel is to be assigned, and a clerk in court ap-

ceased to be a trustee upon his own security, (a) nor to the case of a person, who is in the habit of receiving money of the society, having no treasurer appointed, upon notes, carrying interest payable at one month after demand, that receipt not making such person a treasurer, within the meaning of the act. (b) The preference is given by the act, only in respect of money which got into the hands of the officers, independent of contract; therefore, it does not apply to money borrowed by the treasurer of the society, upon his own security. (c)

Also, under the act of 38 Geo. III. c. 60, for the redemption of the land tax, the Court of Chancery is authorised in several cases to make orders upon petitions only, without suit.

By the act of 52 Geo. III. c. 101, [for the regulation of charities], in every case of a breach of any trust, or supposed breach of any trust, created for charitable purposes, whenever the direction or order of a court of equity shall be deemed necessary for the administration of any trust for charitable purposes, it shall be lawful for any two or more persons to present

(a) *Ex-parte the Amicable Society of Lancaster*, 6 Ves. 98. 444. *Ex-parte Ross*, 6 Ves. 803.

(b) *Ex-parte Ashley*, 6 Ves. (c) *Ex-parte Stamford Friendly Society*, 15 Ves. 280.

it, is confined to the cases of plain
and is not applicable to adverse
able property. (a) The peti-
signature of the Attorney
tor General, in case only
General at the time. (b)
a petition, without
And where an
s act, are pro-
the same objects,
Attorney General, to
proceed. (d) The Master's
petition under this act, may be
tion. (e)

, by statute 39 and 40 Geo. III. c. 56, it
provided, that where money under the control
Of a court of equity, or of which any individuals
or trustees are possessed, shall be subject to be
invested in the purchase of freehold or copyhold
hereditaments, or both, to be settled in such
manner, that it would be competent, in case such
money had been invested in real estate, for the
person, who would be the tenant in tail of the first

(a) *Ex-parte Rees*, 3 Ves.
and B. 10.

(b) *Ex-parte Skinner in Re*
Lawford Charity, 2 Mer. 453.

(c) *Att. Gen. v. Green*. 1
Jac. and Walk. 303.

(d) *Ibid.*

(e) *In the Matter of Slew-*
ringe's Charity, 3 Mer. 707.

Petitions.

petition to the Lord Chancellor, or Master of the
s, for the time being, or to the Court of
hequer, stating such complaint, and praying
a relief, as the nature of the case may require ;
it shall be lawful for the Lord Chancellor, and
the Master of the Rolls, and the Court of
hequer, to hear such petition in a summary
, and, upon affidavits, or such other evidence
shall be produced upon such hearing, to deter-
e the same, and to make such order therein,
with respect to the costs of such application,
to him or them shall seem just ; and such
er shall be final and conclusive, unless the
y or parties, who shall think himself or them-

under this act, is confined to the cases of plain breaches of trusts, and is not applicable to adverse claims on the charitable property. (a) The petition must have the signature of the Attorney General; or of the Solicitor General, in case only of there being no Attorney General at the time. (b) And an order made upon such a petition, without such signature, is a nullity. (c) And where an information and petition under this act, are proceeding together, and include the same objects, the court will refer it to the Attorney General, to consider which should proceed. (d) The Master's report made on a petition under this act, may be confirmed by *motion*. (e)

Also, by statute 39 and 40 Geo. III. c. 56, it is provided, that where money under the control of a court of equity, or of which any individuals or trustees are possessed, shall be subject to be invested in the purchase of freehold or copyhold hereditaments, or both, to be settled in such manner, that it would be competent, in case such money had been invested in real estate, for the person, who would be the tenant in tail of the first

(a) *Ex-parte Rees*, 3 Ves. and B. 10.

(b) *Ex-parte Skinner in Re Lawford Charity*, 2 Mer. 453.

(c) *Att. Gen. v. Green*. 1 Jac. and Walk. 303.

(d) *Ibid*.

(e) *In the Matter of Slew-
ringe's Charity*, 3 Mer. 707.

Petitions.

l therein, either alone or together, with the
who would be the owner of the particular
g estate therein, if any, by deed, fine, or
recovery, in case of freehold heredita-
or by surrender and recovery, or either of
the case of copyhold ; to bar the said es-
the right of all persons in remainder, it
be necessary to have such money actually
in lands, to bar the entail estate and re-
s over ; but it shall be lawful for the Court
cery, or such court of equity, under the
of which such money shall be, and in the
rustees, for the Court of Chancery, in a
y way, upon the petition of the tenant of

reference is considered by the court to be indispensable, (a) and the order for the payment of the money to the petitioner, is accompanied with a direction, that it shall have no effect, unless the tenant in tail shall be living on the second day of the next term. (b) This act applies only to those cases, where the right of the person calling himself the tenant in tail, is clear and indisputable: therefore, if there is a question, whether he be a tenant in tail, or only tenant for life, the court will, not upon this petition, decide the point. (c)

This act of the 39th and 40th of Geo. III. c. 56, has been repealed, and in part re-enacted, by the act of 7 Geo. IV. c. 45, which dispenses with the separate examination in court, or upon commission, and consent of *feme coverts*, in cases where the fund shall be less than 200*l.*; and then proceeds to enact, that it shall be lawful for the Court of Chancery, under the circumstances specified in the former act, to make such orders and declarations as are herein-after mentioned; viz., in case such petition shall be presented by the person who would, at the time of presenting the same, be tenant in tail in possession of the

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|------------------------------|-------------------------------|
| (a) Ex-parte Bennet, Ex- | 12, in note. Ex-parte Bennet, |
| parte Dolman, 6 Ves. 116. | ex-parte Dolman, 6 Ves. 116. |
| Ex-parte Forth, 8 Ves. 609. | (c) Ex-parte Sterne, 6 Ves. |
| (b) Lowton v. Lowton, 5 Ves. | 156. |

Petitions.

aments to be purchased free from incum-
s, or shall be presented by the person
ould, at the time of presenting such peti-
e tenant of the first estate tail, together
or without, the consent of the person (if
ho would be owner or owners of the ante-
particular estate, or who would be entitled
charge or incumbrance antecedent to the
or estates of such tenant in tail, as the case
e, to order the money subject to such trust,
paid to the petitioner, or to be paid and
d in such manner as the petitioner shall
t, and the court shall approve of. And in
uch petition shall be presented by the per-

of all persons in remainder after such estate or estates tail, but without the concurrence of all the persons who would be entitled to particular estates in, or to charges or incumbrances upon, the said hereditaments, antecedently to such estate tail, to declare that such estate tail, and all remainders and reversions expectant thereon, is and are absolutely barred, and to order that the hereditaments to be purchased with the money subjected to the said trust, shall, when purchased, be settled subject to the uses antecedent to such estate tail, to the use of the person who would have been entitled to such estate tail, his heirs and every such declaration and order shall be binding, not only on persons who would have been entitled to such estate tail, but also upon all persons who could have claimed through or under such persons, by force only of such entail, or in remainder or reversion after such estate tail.

Under the statute 56 Geo. III. c. 60, (an act which authorises the transferring stock, upon which dividends shall have remained unclaimed for the space of, at least, ten years, at the Bank of England, and also all lottery prizes, and balances of sums of money issued for paying the principals of stocks or annuities, which shall not have been demanded for the same period to the commissioners for the reduction of the national debt,) the Bank of England are empowered to direct the ac-

Petitions.

ant general of the Bank to re-transfer any such stock to any person establishing a claim to such stock, &c. But if the Bank shall be not ed of the justice of such claim, then the ant may, by petition, in a summary way, ap- the Court of Chancery, or to the Court of quer; and a copy of the petition is to be on the Attorney General, and upon the missioners for the reduction of the national and the court may make such order thereon ll appear to be just.

s not necessary to serve the Bank with a copy petition. (a) The provision in this act, enti-

of the application are in general to be paid out of the stock in question. (a)

Under this head of summary jurisdiction, it is not irrelevant to observe, that the court will not compel, on a petition, a vendor's solicitor, by virtue of its summary jurisdiction over solicitors, to perform an undertaking given by him at the sale, to do certain acts for clearing the title to the estate. (b) It is proper also to add, that the applications to the Lord Chancellor, in lunacy and bankruptcy, are by petition; but as they are made to him, not as a judge sitting in a court of equity, but under a special delegated authority, it will not be necessary to say any thing on the subject relating to them.

But an order may sometimes be obtained in bankruptcy by motion. Thus, where a petition has been presented to expunge a debt proved by A (who afterwards died) on behalf of himself and his partner, who resided abroad, the Vice Chancellor, Sir John Leach, made an order upon *motion*, that service of the copy of the petition, on the partner's attorney, should be deemed good service. (c)

(a) *Ex-parte Martin*, 3 Jac. 55.

(c) *Ex-parte Palon in Re Anderson*, 3 Mad. 116.

(b) *Peart v. Bushell*, 2 Sim. 38.

Motions and Petitions.

old order of the court, (a) no order, made
petition, (unless the same be by way of sum-
shall be effectual to ground *subpœnas*, or
process, unless within three days, in term
a week, in the vacation, after the order
the same be drawn up and entered with
ster, to the end no person may be sur-
y any private order. But this rule seems,
modern practice, to be otherwise; and
er may be drawn up almost at any time,
it be before such *subpœna* or process
ord Chancellor appoints days, during the

SECTION II.

Affidavits.

Affidavits are usually resorted to, in support of motions and petitions. An affidavit, generally speaking, is an oath in writing, sworn before some person who has authority to administer such oath. No commitment can be made on a foreign affidavit, because no perjury can be assigned thereon. (a)

The affidavit of a peer is upon oath. (b) The affidavit ought to name the place of residence, and title, of the person making it, and the court, the title of the cause or matter in which it is made; and ought not to run into unnecessary and irrelevant statements, or to contain any scandalous matter; if it should, it may be referred to the Master for impertinence or scandal. (c) And if a whole petition is recited in an affidavit of service, the court will order the attorney to pay the costs of it. (d) But an affidavit cannot be referred for

(a) *Musgrave v. Medex*, 19 Ves. 652. *lips v. Millman*, 1 Dick. 112 and 113. *Ex-parte Simpson*,

(b) *Meers v. Lord Stourton*, 15 Ves. 476. *Anonymous*, 1 P.W. 146. See *Beam. Cha.* 3 Ves. and B. 93.

Ord. 105. (d) *Ex-parte Smith*, 1 Atk. 133.

(c) *Ex-parte Smith*, 1 Atk. 138. *Jobson v. Leighton*. Phil-

Affidavits.

tinence after a counter affidavit, by the party
aining of the impertinence; but a counter
vit does not prevent a reference for scan-
) So an affidavit may be referred for scan-
though it be presented for the express pur-
f discrediting the testimony of the person
character is attacked, if it goes into parti-
of facts of a scandalous nature. (b) It may
improper here to observe, that it is irregu-
refer separate answers for insufficiency by
der. (c) From thence it may be fairly in-
that it would be irregular to refer for
l and impertinence, by one order, two affi-
sworn by different persons. (d) In an affi-

or, if he does, the register of affidavits, or his deputy, may refuse to file them. (a) But where small blots, or interlineations, occur, the register usually marks them in the margin. (b)

Affidavits, taken before the Master, are to be brought into the register's office to be filed in some due and convenient time after they are sworn. (c) Also, the deponent ought to sign his name, or mark, on the left side of the affidavit, the *jurata* being on the right; and he must be sworn to the truth of it, either before a Master in Chancery, at the public office, or the Master's house, or before a Master extraordinary in the country; but the latter cannot take affidavits in London, or within twenty miles of it: and it is to be observed, that every Master extraordinary must, at the bottom of every affidavit, express the name of the town and county where he takes it, or it will not be held authentic, or be filed. (d) And an affidavit taken before a solicitor in the cause, cannot be read. (e) An affidavit taken before a Master extraordinary, in Ireland, has been permitted to be read in this court. (f) And where a party, to be examined on affidavit, was resident at Amsterdam, the court ordered that he should be examined before a no-

(a) Beam. Cha. Ord. 65.

(d) Beam. Ord. Cha. 212.

(b) Harr. Cha. Pract. edit.
of 1808, p. 399.

(e) *In re Wogan*, 3 Atk. 813.

(f) *Anneyley v. Anglesey*, 1

(c) Beam. Cha. Ord. 149.

Dick, 90.

Affidavits.

public there, with the intervention of a proper
rate, if necessary by the law of Holland, to
administration of an oath.(a) But an affidavit
in one cause cannot be read as the ground
for obtaining an order in another cause, although
between the same parties; but there must be an
issue in the cause in which the application is
made.(b) If the party, who makes the application
to read affidavits made in another mo-
ment in the same cause, or the answer, or other
pleadings therein, not the immediate ground of
the application, notice must be given to the oppo-
site party of such intention.

grounded upon an affidavit. (a) But, notwithstanding this positive regulation, a practice had obtained of issuing attachments, without an affidavit previously filed at the affidavit office ; but Lord Eldon ordered that such practice should be corrected in future. (b)

There is no precise time required for filing the affidavit before the application is made to the court ; only, it ought to be filed so long before the application, as that the other side may have time to take a copy of it ; and in a motion to extend an injunction to stay trial, it was considered as no objection that the affidavit [viz., that the plaintiff could not go to trial with safety till the answer came in] was filed only the day before. (c) But where the court directs that affidavits on both sides should be filed within a certain limited time, and some of the affidavits on one side happen not to be filed on that day, the court will not enlarge the order further, that the other side may give an answer to those affidavits. (d)

(a) Beam. Cha. Ord. 55, 56, 64, 142, 148. Note. Same rule as to Reports, Beam. Cha. Ord. 307.

(b) Broomhead v. Smith, 8 Ves. 357.

(c) Jones v. ———, 8 Ves. 46.

(d) Barnard. 402.

Interlocutory Orders.

SECTION III.

Interlocutory Orders.

Orders may be divided into common and special orders, and also into those which are made in the first instance, and those which are conditional. Common orders are those, which may be obtained as a matter of course, and without notice, such as orders for the different degrees of contempt against an absconding de-

scription is the order *nisi* to dissolve the common injunction upon the coming-in of the answer ; or to confirm the Master's report. If an order *nisi* is obtained upon affidavit, it is not necessary, that it should be mentioned and referred to in the order. (a) It is also proper here to observe, that there are cases where, although by the language of the order it appears to be absolute in the first instance, yet it cannot be acted upon without another order ; as an order that a party should bring in books and papers before a Master within four days, or that a serjeant at arms should go against him ; upon the party's disobeying that order, a fresh order upon the Master's certificate must be applied for, to have him committed. (b) And it seems the same rule applies to cases, where the order is that the party should go before the Master, and be examined on interrogatories. An order of the above description (usually called a four-day order) is obtained upon a motion of course. But when an order to pay costs is made on a person not a party to the suit, a motion for a four-day order or commitment, requires notice. (c)

After an order has been obtained, it is drawn up by the register, who attended in court when

(a) Wy. Pract. Reg. 297.

(c) In re Partington, 6 Ves.

(b) Carleton v. Smith, 14 71.

Ves. 180.

Interlocutory Orders.

ification for it was made ; if any former has been obtained, touching the same matter, is brought to be recited by the register in support of the present order, (a) which is passed by the register's signing his initials on the left-hand side of it ; after which it is entered, that is, *verbatim* by the entering register, in the register's book, who uses the word " entered " at the foot of the order. An order cannot be drawn up, until it is drawn up and perfected in the register's book. (b)

A frequent application to the court to enter an order *nunc pro tunc*, which is a motion of

to add, that an order may be discharged, not only by appeal, or on a rehearing, but by motion or petition; on the ground that it was obtained upon false suggestions; or upon producing new facts; or sometimes on account of a supposed error in the order itself, upon the same facts.

After an order is drawn up, passed, and entered, it is to be then served, where service is necessary. In an order *nisi* to dissolve an injunction, it is directed that the injunction shall be dissolved; unless the plaintiff, having notice of the order, shall, on a specific day, show cause to the contrary. The time appointed in this order for showing cause in term, is on Thursday (if that be a day for motions), and on the first and last days of term; and during the sittings on one of the seal days; and the order *nisi* must be served two clear days before the day on which it is to be made absolute; (a) but in an order *nisi* to confirm the Master's report, the report is directed to be confirmed, unless the party affected by it, having notice of the order, shall, within eight days after service of it, show to the court good cause to the contrary. All orders *nisi* must be served; and it is the practice to serve all common orders (they being

(a) 23rd of the General Orders of 1828.

Interlocutory Orders.

without notice), with the exceptions which are the foundation of common as an order for a commission and sermons. (a) But those orders which are upon notice, and upon hearing counsel sides, (b) do not in general require to be By the 21st of the General Orders of the order *nisi* for confirming a report, may be obtained upon petition as well as by motion, and the service thereof upon the clerk in court of any good service on such party; and, by the same order, the order *nisi* for dissolving the connection, may be obtained upon petition, as well as by motion.

with the necessity of an affidavit of service.(a) But personal service will be dispensed with, where the party cannot be found;(b) and then service on his clerk in court will be substituted for personal service. An order pronounced by the court, although it irregularly issued, is not a mere nullity; and before any proceeding can be had, as if no such order had been obtained, it must be discharged.(c)

Such orders as do not fall within the description of cases above alluded to, do not in general require personal service; but the usual service is either by delivering a copy of the order in question to the clerk in court himself, or leaving it with his clerk or agent at his seat in the six clerk's office, the original order being shown to the person served, at the time of service.

The order *nisi* having been served in the regular way, and no cause being shown against making that order absolute, it may be made absolute on the day appointed for showing cause, upon affidavit of service of the order *nisi*; but the party who is the object of the order, has all the day

(a) *Whitehead v. Thistlethwaite*, 3 Atk. 618.

(c) *Boddy v. Kent*, 1 Mer. 361.

(b) *Jackson v. ———*, 2 Ves, J, 417.

Interlocutory Orders.

the sitting of the court to show cause. Without a motion and an affidavit, such order is absolute, although no cause is shown, unless so ordered; but you may move to make the order *nisi* absolute, after the day given to show cause: but then you must produce not only an affidavit of service of the order, but also a certificate from the register, that no cause is shown to the contrary. (a)

Orders are enforced in the same manner as decrees, which will be mentioned in a subsequent chapter. It is sufficient here to observe, that in general the mode of enforcing obedience to a spe-

and who is disobedient, the serjeant at arms is the first process. But it is proper here to observe, that no writ of execution issues except in the case of a party; and that against any other person whom you want to compel to pay money into court, an order issues that he pays the money by a given day; if he does not, another order issues that he pays on a given day, or to stand committed. (a) In the case also of a solicitor, or other officer of the court, who is supposed to be always present there, the bare service of the order without a writ of execution, is deemed sufficient. (b) It is proper to add, that a person may be arrested on a Sunday, under a warrant of the court, for disobeying an order. (c) Although an order which has been made, must be obeyed, yet, on an application against a person guilty of a breach of it, the court will give to him the benefit of the fact, that the order ought not to have been made. (d)

It may be proper to add, that by the 44th of the General Orders of 1828, whenever a person, who is not a party, appears in any proceeding, either before the court, or before the Master, ser-

(a) Anon. 14 Ves. 207.

(c) Ex-parte Whitechurch, 1

(b) Harr. Cha. Pract. edit. of Atk. 55.

1808, p. 513.

(d) Drewry v. Thacker,
Swanst. 546.

Interlocutory Orders.

in the solicitor in London, by whom such
appears, whether such solicitor act as prin-
cipal agent, shall be deemed good service, ex-
cept in matters of contempt, requiring personal

CHAPTER V.

INTERLOCUTORY APPLICATIONS BY PLAINTIFF,
CHIEFLY ON DEFENCE BEING PUT IN.

Dismissal of the Bill by the Plaintiff: Reference of the Answer for Insufficiency, and Scandal, and Impertinence: Amendment of Bill: Production of Deeds and Writings: Payment of Money into Court: Receiver: Injunction: Ne exeat Regno.

AFTER the defendant has put in his demurrer, plea, or answer, it becomes necessary for the plaintiff to consider whether he can, with a fair chance of success, proceed in the suit; if it is thought that he cannot, the plaintiff may move to dismiss his bill; but (supposing an answer to be put in) it may be so *insufficient*, that the plaintiff is not at present put in a condition to decide upon the above point, or it may be *scandalous* or *impertinent*; and, therefore, whether the plaintiff intends to proceed or not in the suit, it may be fit, in order to protect his character and save expense, to procure such improper matter to be expunged. The inspection of the answer may, also, instead of making it necessary to consider

Dismissal of Bill by the Plaintiff.

to be taken to bring the cause to a hearing, suggest the propriety of amending the bill, or going to the court for some special order connected with the object of the suit, as for the production of papers and writings, for the payment of money into court, the appointment of a receiver, or for an injunction.

SECTION I.

Dismissal of Bill by the Plaintiff.

the Plaintiff is entitled, as of course, at any time

plaintiffs propose to examine him as a witness; (a) in any of these cases, upon application to the court for the purpose, his name will be ordered to be struck out of the engrossment, upon payment of costs, or giving security for costs to that time. In the first-mentioned case, it seems that this order may be obtained without the consent of, or notice to, the co-plaintiff; (b) and, in the second-mentioned case, the court (unless he is thereby materially injured; in which case, the order will not be made, except the injury be obviated,) (c) will order the person who used the plaintiff's name improperly, to pay the costs. (d) But a case has occurred, where the application not being made till the cause was at issue, the court, on the ground that striking out the plaintiff's name might derange the cause, and impede the hearing, refused the application; but directed the notice to be saved, till the hearing of the cause, viz., in case the plaintiff should be ordered to pay costs, the solicitor, who had improperly inserted the plaintiff's name, might be ordered to indemnify him. (e) In like manner, a bill being dismissed with costs, a

(a) *Lloyd v. Makeam*, 6 Ves. 145.

(b) *Wy. Pract. Reg.* 179.
Langdale v. Langdale, 13 Ves. 167.

(c) *Holkirk v. Holkirk*, 4 Madd. 50.

(d) *Harr. Cha. Pract.* 1808, p. 319. *Wilson v. Wilson*, 1 Jac. and Walk. 458.

(e) *Yeomans v. Kilvington*, 1 Dick. 351. *Dundas v. Dutens*, 1 Ves. J. 196.

Dismissal of Bill by the Plaintiff.

who was made a co-plaintiff, without his
or knowledge, is liable for the costs to
adant, but is entitled to be indemnified by
tor. (a) But in none of these cases, is the
entitled to dismiss the bill, or strike his
m the record, without costs paid, or se-
the defendant, unless it be consented
But if there is a written agreement be-
e plaintiff and defendant, in order to set-
ispute which was the subject of the suit,
which agreement was, that the plaintiff's
ld be dismissed without costs; in such a
defendants having been served with no-
he motion, and not appearing, the court

After a decree the plaintiff cannot dismiss his bill, even upon payment of costs, and with a consent; for then it can be dismissed only upon an appeal or re-hearing. (a) If, however, the decree directs only inquiries to determine, for the first time, what is to be done, the parties may consent to have that done on *motion*, which might be done on further directions. (b) In such a case, therefore, a bill may be dismissed by motion; and the plaintiff may dismiss his bill, after demurrer to it allowed, but with liberty to amend, upon payment of five pounds, the costs of the demurrer. (c) Although a cause be brought to a hearing, and an issue directed, till the issue has been tried, and there has been a determination, let the cause be in what stage it may, the plaintiff may, upon motion, dismiss his bill upon payment of costs. (d)

(a) *Lashley v. Hogg*, 11 Ves.
602.

(b) *Anonymous*, 11 Ves.
169.

(c) *Edwards v. Edwards*, 6
Mad. 255.

(d) *Carrington v. Holy*, 1
Dick. 286.

ference of Answer for Insufficiency, &c.

SECTION II.

*ence of Answer for Insufficiency, Scandal,
and Impertinence.*

Defendant is required by the bill, and by the
the court, to answer the matters stated in
according to the best of his knowledge,
brance, information, and belief. His an-
must not be evasive, but positive and direct;
sufficient for him to say that he admits or
, that such a particular fact or event might

wherever there are particular precise charges; they must be answered particularly, and precisely; and not in a general manner, although the general answer may amount to a full denial of the charges. (a) Thus, if a bill requires a general account, and at the same time calls upon the defendant to set forth whether he had received particular sums specified in the bill, with many circumstances respecting the times when, and of whom, and on what account, such sums have been received, it is not sufficient for him to say *generally*, that he has, in his schedule to his answer, set forth an account of all sums received by him. (b) But a defendant is not bound to answer a fact to which he is interrogated, if there is nothing in the prior part of the bill to warrant an inquiry respecting it. But a variety of questions may be founded on a single charge, if they are relevant to it. Thus, in a bill against an executor, for an account of the personal estate of his testator, upon the single charge that he has proved the will, may be founded every inquiry necessary

any part thereof, or else set forth what part he has received. And if a fact be laid to be done with divers circumstances, the defendant must not deny or traverse it literally, as it is laid in the bill, but must answer the point of substance, positively

and certainly. See also Beam. Cha. Ord. 28.

(a) Mitf. 247. Wharton v. Wharton, 1 Sim. and Stu. 235. Trout v. Underwood, 2 Cox. 135.

(b) Mitf. 247.

ference of Answer for Insufficiency, &c.

tain the amount of the estate, its value, positions made of it, the residue undisposed of the debts of the testator. (a) And the charge, as to the fact of payment of a sum of money, enables the plaintiff to put all questions on it that are material to make out, whether it was paid. (b)

the discovery sought by the bill, will subject the defendant to any punishment or forfeiture, (c) or will prejudice him as a purchaser for valuable consideration, without notice of the true title, (d) the defendant may, by his answer, as well as by plea, protect himself from making any discovery.

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if the defendant denies a substantive fact, upon which the plaintiff's title to relief depends, the defendant is not bound to answer further. But there are other cases, in which the court has held a contrary doctrine, proceeding on the ground, that the defendant ought to have resorted to the other modes of defence, by demurrer or plea; and such is now the rule of the court. (a) And it is no ground for a defendant's not answering fully, that he is a mere witness; for he ought to have demurred, or pleaded, instead of submitting to answer. (b)

An answer is considered by the court as sufficient, if all the *material* facts in the plaintiff's bill are fully answered. It is, therefore, a frequent question, upon exceptions to the Master's report on the sufficiency of an answer, whether the facts, which are alleged not to have been answered, are relevant or material. And it seemed, that when the exceptions to the answer were, in the first in-

Taylor v. Milner, 11 Ves. 41. term, 1819. Mazarredo v. Dolder v. Lord Huntingfield, Maitland, 3 Mad. 66, 70. ibid. 283. Faulder v. Stewart, ——— v. Harrison, 4 Madd. 252. ibid. 296. Shaw v. Ching, 252. ibid. 303. Rowe v. Teed, 15 (b) Ellison v. Cookson, 2 Ves. 372. Bro. C. C. 252. Cartwright v.

(a) Butt v. Butt, before the Hately, 3 Bro. C. C. 238. Vice Cha. sittings after Hilary

ference of Answer for Insufficiency, &c.

discussed before the Master, to whom they referred, he was at liberty to consider the relevancy of the facts in question. And now, by the General Orders of 1828, it is expressly provided that the Master, in deciding on the sufficiency or insufficiency of any answer or examination, shall take into consideration the relevancy and materiality of the statement or question referred to.

Cases have arisen, where the question was, whether an answer was so evasive, as that it ought to be taken off the file. In the case of *Tomkins v. Bridge*, (a) Lord Eldon held, upon the autho-

case before Lord Thurlow; but that he was so unwilling to give countenance to such an abuse of the practice, that he thought he never should be induced, upon both those authorities, to make such a decision again; and if such an attempt were repeated, he should hold it to be no answer. And in the above case of *Smith v. Serle*, where an application was made, that the answer to an amended bill might be taken off the file, on the allegation that it was a mere transcript of the answer to the original bill, Lord Eldon referred it to the Master to see, whether the answer was a substantial answer to the amended bill. But in the case of *Marsh v. Hunter*,^(a) where a motion was made to take an answer off the file, only two unimportant facts being answered, the rest of the bill being unanswered, Sir John Leach, Vice Chancellor, refused the application, thinking that the answer must be disposed of by exceptions.

Exceptions to an answer, on the ground of insufficiency, are allegations in writings, stating the particular points,^(b) or matters, in the bill, which the defendant has not sufficiently answered;

(a) 3 Madd. 437.

of an answer, without showing

(b) Note. By the 52nd of Lord Bacon's Orders, Beam. Cha. Ord. 24, no reference is to be made of the insufficiency

of some particular point of the defect, and not upon surmise of the insufficiency in general.

Reference of Answer for Insufficiency, &c.

are drawn, or settled, and signed by counsel. The plaintiff must observe, if defendants appear separately, to take separate exceptions to the answer, (a) and to be careful in drawing the exceptions; for after they are filed, generally no exceptions can be added. (b) However, in a case of plain mistake, the court, upon special application, and payment of costs, will give the plaintiff leave to amend his exceptions; as where exceptions were taken from the wrong bill. (c)

Generally, a plaintiff cannot except to an answer which he has amended his bill; but merely adding

been answered, because the further answer is made material by the new case. (a) And if a plaintiff excepts to an answer, and afterwards moves for an order to amend, that operates as a waiver of the exception to the answer; for the plaintiff, by the amendments, may strike out the very passage in respect of which, the answer was excepted to. (b)

The plaintiff must also take care, not to reply to the answer, if he means to except to it, for thereby the answer is admitted to be sufficient. (c) However, under special circumstances, the court may be induced to permit the replication to be withdrawn, and the exceptions received. (d)

It is proper here to observe, if there be a plea or demurrer to part of the *discovery* sought by the plaintiff's bill, and an insufficient answer to the residue, yet the plaintiff cannot except until the plea or demurrer is determined. (e) But if to a bill, a defendant answers as to the matter of discovery, and pleads only as to *relief*, the

(a) *Mazarredo v. Maitland*,
3 Madd. 66 and 72.

(b) *De la Torre v. Bernales*,
4 Madd. 396.

(c) 62nd of Lord Bacon's
Orders, Beam. Cha. Ord. 28.

(d) *Harr. Cha. Pract.* 1808,
p. 197.

(e) *The London Assurance
Company v. the East India Com-
pany*, 3 P. W. 325.

Reference of Answer for Insufficiency, &c.

ff may except to any matter of discovery the plea is argued. (a) Lord Eldon, in *v. Mills*, (b) observes, that the above rule, plaintiff cannot except, pending a demurrer, have reference to the understood practice of the court, that he could not except without admitting the validity of the demurrer. For Lord Eldon, in his *Chancery Pleadings*, 252, expressly says, that where a defendant pleads or answers to any part of the discovery sought by bill, and answers likewise, if the plaintiff makes exceptions to the answer before the demurrer has been argued, he admits the demurrer to be good. However, the

need not take exceptions; and the defendant must answer the whole bill, as if no defence had been made to it. (a)

After the exceptions have been drawn, they are to be delivered by the plaintiff's clerk in court to the defendant's clerk in court, or his clerk or agent at his seat, first marking them at the top with the day and year when delivered; which is called filing exceptions. If the answer was filed in term, the exceptions were to be delivered in the same term, or within eight days after; if the answer be filed in the vacation, within eight days after the beginning of the following term. (b) After this period, the plaintiff could not file exceptions without leave of the court, unless the defendant would consent to it. But the court would give the plaintiff leave to file exceptions *nunc pro tunc*, as of course, in a bill for relief, if the application were made within the two next terms, and the following vacation; (c) but afterwards, (d) or though the application be within two terms, if the bill be for a discovery merely, (e) only upon special circumstances. But

(a) *Mitt.* 252.

(d) 3 *Atk.* 19.

(b) *Harr. Cha. Pract.* 1808, p. 197. *Beam. Cha. Ord.* 181, 182.

(e) *Hewart v. Semple*, 5 *Ves.* 86. *Sed vide Baring v. Prinsep*, 1 *Mad.* 526.

(c) *Thomas v. Llewellyn*, 6 *Ves.* 823.

Reference of Answer for Insufficiency, &c.

The 4th of the General Orders of the 3d of 1828, in all cases, whether the defendant's answer be filed in term time or in vacation, the plaintiff shall be allowed two months to deliver exceptions to such answer; but if the exceptions be delivered within two months, the answer thenceforth be deemed sufficient, and the plaintiff shall have no order to deliver exceptions *pro tunc*.

If an answer is referred for impertinence, and is reported impertinent, the period within which exceptions for insufficiency are to be filed, shall run from the date of the answer, but

abandoned the exceptions; in which latter case, such answer shall be thenceforth deemed sufficient. By the 6th Order, if the plaintiff do not, within a fortnight after a defendant's second or third answer is filed, refer the same for insufficiency, on the old exceptions, such answer shall be thenceforth deemed sufficient. And by the 7th of those General Orders, if a plaintiff do refer a defendant's second or third answer for insufficiency, on the old exceptions, then the particular exception or exceptions to which he requires a further answer, shall be stated in the order. When the plaintiff has not before answer obtained the injunction, in an injunction cause, he may procure the order of reference immediately. (a) The right of a reference *instanter*, is also given to a defendant, when, by overruling the exceptions, he will dissolve the injunction. (b) But if the plaintiff, in an injunction suit, is already in possession of an injunction, he cannot obtain this reference *instanter*, for the reason ceases, *i. e.*, the protection from delay in obtaining injunction. (c) Where one of two defendants puts in an insufficient answer, so reported by the Master, and adjudged by the court, and the other defendant puts in just

(a) *Morgan v. Dalrymple*,
before Lord Eldon, Hil. T. 1809.
See *Candler v. Partington*, 6
Mad. 102.

(b) Per Vice-Chancellor in
Candler v. Partington, 6 Mad.
103.

(c) *Candler v. Partington*, 6
Mad. 102.

Force of Answer for Insufficiency, &c.

After answer, the court decided on its merits, without sending it to the Master. (a) Defendants put in a joint answer, which is referred to, and one of them dies, the exceptions are referred as to the survivor's answer only. (b) Defendant may put in a second answer, and the exceptions to the first. (c)

On order of reference being produced to the court, he issues a warrant for the parties to attend him at his chambers; on failure of attendance he will issue a second and then a third, the last is commonly called a peremptory warrant. There is an interval of one whole day between the day of service, and the day of attendance, is sufficient. And in injunction causes, where exceptions to an answer are shown as cause against granting an injunction, as the court imposes on the plaintiff the terms of procuring the answer, even a less time

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and it shall not be necessary for the plaintiff to serve a *subpoena* for the defendant to make a better answer: and any defendant who shall not put in a further answer within the time so allowed, shall be in contempt, and dealt with accordingly. And by the 9th order, if, upon a reference of exceptions, the answer be certified sufficient, it shall be deemed so from the date of the Master's report. And if the defendant submits to answer without a report from the Master, the answer shall be deemed insufficient from the date of the submission.

The plaintiff cannot add to the number of the old exceptions; but the plaintiff may amend his bill upon the answer being reported or admitted to be insufficient, and obtain an order that the defendant should answer the exceptions and amendments at the same time. (a) If the amendments are not answered, the reference then is upon the new exceptions, as to the amendments, and upon the old exceptions; but the plaintiff cannot take new exceptions to any thing in the original bill: but as the introduction of circumstances by amendment may vary the colour and quality of facts in the original bill, so that it may be impossible to separate or distinguish them,

(a) *Partridge v. Haycraft*, 10 Ves. 570.

Reference of Answer for Insufficiency, &c.

plaintiff is entitled then to have the Master's report sent upon the answer to the amendments, and a reference to such parts of the original bill as are material to them; and this is the utmost he can demand.

(a) In case the defendant puts in an answer to the original bill, and in fact, an answer to the amended bill, the plaintiff should either move to take the original answer off the file, as the title did not correspond with the order, or if for any reason he desires to keep the last answer on the file, he ought to move specially to issue an attachment; but it is equally improper to seal an attachment for want of an answer. (b) On a reference to the Master upon the original exceptions, the Master's judgment ought to be final, and he ought not to be allowed to amend his report.

sufficient, (and by the old practice, not until the 4th answer being so reported) the plaintiff might, as of course, move on the Master's report filed, that the defendant may be examined upon interrogatories, and be committed till he has answered them, and paid the costs. (a) But it is proper here to observe, that by an order of the 30th April, 1700, (b) a defendant may be committed after a third answer is reported insufficient. It seems, however, that this order was not acted upon, and the practice has still continued conformable to Lord Clarendon's order; and in a late case, where a defendant had put in three insufficient answers, and for want of a fourth, had been committed to the Fleet Prison, the court discharged the defendant out of custody upon his filing a fourth answer, without waiting for the Master's report upon the sufficiency of it. (c) The sufficiency of the fourth answer is to be decided on, not upon looking at the fourth answer only, but by looking at it connected and taken with the three preceding answers. (d) But by the 10th of the

(a) 61st of Lord Bacon's Ord., Beam. Cha. Ord. 28., and 66th Lord Clarendon's Orders, Beam. Cha. Ord. 182 and 183.

(b) See Beam. Cha. Ord. 317.

(c) *Balfour v. Farquarson*, 1 Sim. and Stu. 72, and 1 Turn. 184.

(d) *Farquarson v. Balfour*, 1 Turn. 189, 190.

reference of Answer for Insufficiency, &c.

al Orders of 1828, upon a *third* answer reported insufficient, the defendant shall be sent upon interrogatories to the points reported insufficient, and shall stand committed until such defendant shall have perfectly answered such interrogatories, and shall pay, in addition to the pounds costs, heretofore paid, such further costs as the court shall think fit to award. The interrogatories are to be settled by the Master, and must go directly to the points on which the objections are sustained. (a) The defendant may be defended by counsel upon his examination before the Master. (b) The mode appointed by the Master, in *Farquarson v. Balfour*, for the examination of the defendant, shall be followed.

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the plaintiff has no right to have such notice. (a) But the defendant is not to be discharged out of custody upon the report of the Master, of the sufficiency of his examination, till the plaintiff has seen latter. (b) The object of the court in directing the defendant to be examined upon interrogatories, is, that upon that examination, he shall not be liberated out of custody, till he has given a sufficient answer, not only to the questions contained in the bill, to which he has not before answered, but to every question which the Master thinks may fairly arise out of the matter, which may be contained in the answers to those questions, without putting the plaintiff to the trouble of amending his bill. (c) On the motion by the defendant, that he may be discharged out of custody on the Master's report that the examination is satisfactory, the plaintiff may show cause against the discharge, on the ground, that it was insufficient; and it seems that the proper mode of discussing the insufficiency of the defendant's examination is upon the old exceptions, with respect to any of the original interrogatories in the bill remaining unanswered; and upon new exceptions with respect to any new questions, which the Master may have introduced

(a) *Farquarson v. Balfour*, 1
Turn. 200, 203.

(b) *Farquarson v. Balfour*, 1
Turn. 202.

(c) *Ibid.*

reference of Answer for Insufficiency, &c.

ling the interrogatories. (a) An examination may be quite sufficient, though it is untrue, consistent with what has been sworn by the defendant in his answers. The principle of the rule is, that the plaintiff must be satisfied with the answer. The conscience of the defendant allows him to answer. (b)

We have seen that, in these cases, where the answer is reported insufficient, the plaintiff is not obliged to serve the defendant with a *subpœna* to make a better answer, but the Master is to fix a time to be allowed for putting in a further answer, &c.; and any defendant who shall not make a further answer within that time shall

by the old practice, if the costs were accepted by the plaintiff, and the answer was afterwards reported insufficient, the plaintiff must have begun *de novo*. But now, by the 24th of the General Orders of 1828, when a defendant in contempt for want of answer, obtains upon filing his answer, the common order to be discharged, as to his contempt, on payment or tender of the costs thereof, the plaintiff *shall not, by accepting such costs*, be compelled, in the event of the answer being insufficient, to re-commence the process of contempt against the defendant, but shall be at liberty to take up the process at the point to which he had before proceeded. If, after process of serjeant at arms has issued, but before it has been executed, the defendant puts in an answer, which is excepted to, and the exceptions submitted to, the serjeant at arms will be ordered to go. (a) But if the defendant, being in contempt for want of an answer, puts in one, and is discharged on the usual terms, and then on exceptions being taken to the answer, the defendant submits to answer them, and the plaintiff consents to wait for a further answer, till a certain time, by which time the further answer is not put in, the consent of the plaintiff to wait for a further answer, is a waiver of his right to resume the former process of contempt, and he will not

(a) *Waters v. Taylor*, 16 Ves. 418.

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considered as waiving that right conditionally

(a) So, if a defendant, being in contempt, having submitted to a sequestration, unless puts in an answer, files one to which exceptions are taken, and some allowed, and some overruled, and the plaintiff excepts to the Master's report, as to the exceptions overruled; and the defendant, as to those which the Master has allowed, though the plaintiff's exceptions are allowed by the court, and the defendant's disallowed, the plaintiff is not entitled to process of sequestration *immediately* against the defendant; because the defendant might have put in an answer to the exceptions allowed by the Master,

Reference of Answer for Impertinence, &c, 275

the plaintiff by the insufficiency of the answer of any defendant, shall be deemed to be part of the plaintiff's costs in the cause, such sum or sums being deducted therefrom as were paid by the defendant according to the course of the court, upon the exceptions to the said answer being submitted to or allowed.

An answer may also be referred to a Master, as we have seen a bill may, for scandal and impertinence, and for the same causes. In a bill for an account, the defendant is not justified in setting out all the items of each tradesman's bill which he paid, relating to that account, unless they are specifically called for by the bill. In a bill against an executor for an account of the testator's assets, the defendant ought not, in answer to the common interrogatory, to set forth the auctioneer's catalogue. (a) And the whole of the schedule to an answer may be impertinent, although a part of it contains pertinent matter, if the whole is mixed together, so as not to be capable of being separated by the Master. (b) But where a defendant is justified in referring to affidavits and certificates, as forming grounds of his belief, and adding weight and credit to it, as the degree of weight and credit depends on the particular language of the affidavits and certificates, it is not impertinent

(a) *Beaumont v. Beaumont*,
5 Madd. 51.

(b) *Norway v. Rowe*, 1 Mer.
347, 357.

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set them forth in *hæc verba*. (a) The plaintiff may obtain the same sort of order as the defendant might in the other case, *i. e.* that it should be referred to the Master, to look into the pleadings, and certify whether the answer be scandalous or impertinent.

It seems there is no fixed rule as to the time for referring the answer for impertinence; (b) but the court will not allow such a reference where the plaintiff has lain by a considerable time after the plea. (c) An answer cannot be referred for impertinence after a reference for insufficiency; (d) nor after it has been replied to; nor after the

taken; (a) and, upon the application of another defendant, and, perhaps, even of a person not a party to the record, (b) as it is the duty of the court to the public, to take care that the records of the court should be kept pure. However, the Vice Chancellor, Sir John Leach, decided that a stranger to the record could not move to refer a bill for scandal; for, in order to decide upon the scandal, the Master must be attended with an office copy of the bill; but a stranger to the record has no right to take an office copy of the bill; and the order, if made, might be ineffectual. (c) If the Master, upon the office copy of the record being brought to him, certifies that the answer contains scandal or impertinence, the same order will be made by the court as was mentioned in a former page, when we spoke of referring a bill for scandal and impertinence. And if a bill is reported to be scandalous by the Master, a motion for an injunction cannot be made on it, until the scandalous matter is expunged. (d)

The costs always abide the event of the reference; and, therefore, if the Master should report

(a) In note to *Lady Abergavenny v. Abergavenny*, 2 P. W. 312.

(b) *Coffin v. Cooper*, 6 Ves. 514.

(c) *Anon.* 4 Mad. 252.

(d) *Davenport v. Davenport*, 6 Mad. 251.

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answer not impertinent, the court will direct the Master to tax the defendant his costs. (a) The Master's opinion on this reference is not by a report, but a certificate, and does not require confirmation. (b)

In a late order, (c) it is directed that, in future, references of answers of defendants for insufficiency, or for scandal and impertinence, or for impertinence, made in the same cause, be made to the same Master. And it is further ordered, that where answers of defendants have been referred for scandal and impertinence, or for impertinence, and the court shall afterwards refer the

an answer for insufficiency, or for referring an answer, or other pleading or matter depending before the court, for scandal or impertinence, the order shall be considered as abandoned, unless the party obtaining the order shall procure the Master's report within a fortnight from the date of such order, or unless the Master shall, within the fortnight, certify that a further time, to be stated in his certificate, is necessary, in order to enable him to make a satisfactory report, in which case the order shall be considered as abandoned, if the report be not obtained within the further time so stated; and where such order relates to alleged insufficiency in an answer, such answer shall be deemed sufficient from the time when the order is to be considered as abandoned.

SECTION III.

Amendment of Bill.

I have before observed, that it frequently becomes necessary, in this stage of a cause, for the plaintiff to amend his bill, before he takes any steps to bring the cause to a hearing; and it may be proper here to observe that, regularly, matter subsequent to the original bill, must come in by

Amendment of Bill.

of supplement, or revivor, and not by amend-

(a) Before the plaintiff can amend his bill, he must obtain an order for that purpose; which,

to the extent of one order, is granted, of course,

as soon as a replication is applied for, within six weeks

of the answer. (b) If the new matter does not

extend, in any one place, two folios, the record,

containing the original bill, may be interlined; or

the amendment be by omitting some original

matter, the same is struck out of the record. But

if the amendment be too considerable to be intro-

duced by interlineation, in the original record, a

new bill is engrossed and annexed to the original

(c) If the plaintiff applies to amend before

the defendant has appeared, he obtains the order

order to make the necessary alterations in it; the defendant then being thus apprised that the order to amend has been acted on, leaves this copy with the clerk in court of the plaintiff for that purpose. (a) But, although the plaintiff neglects to call for the office copy, yet, if the defendant is otherwise apprised that an amendment has been made, and permits the cause to come to a hearing, it is then too late to make the objection. (b) If the amendments make it necessary that the bill should be newly engrossed, so that the defendant must take a new copy of it, or are made after answer, and require a further answer, leave to amend is obtained upon payment of twenty shillings costs, to each defendant, who answers separately. And if the plaintiff obtain an order to amend, without costs, amending the defendant's office copy, and the amendments require a new ingrossment, he may amend without the necessity of a new order, paying the 20s. (c) Though this sum, with respect to costs, seems to be too small, the court will not break into this rule, except in a case of particular oppression. (d) But the circumstance that the plaintiff had amended his bill

(a) See *Woodhouse v. Meredith*, 1 Jac. and Walk. 208.

(b) *Ibid.* 204.

(c) *Cox v. Champness*, 6 Mad. 314.

(d) *Earl of Masserene v. Lyndon*, 2 Bro. C. C. 291.

Vide *Rowe v. Stuart*, 1 Dick. 58, note. However, in *Rowe v. Stuart*, 1 Dick 58, where a plaintiff, under a common order to amend his bill, on payment of twenty shillings costs, amended his bill; the amendments being

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several times before, with very large amendments, is not a sufficient ground. (a) But in a case where a bill had been amended three times, and the two last amendments were made necessarily by the negligence or error of the plaintiff, or where the amendments were frivolous, the defendant was ordered to pay extra costs for those amendments. (b) It should be observed, that if the amendment consists in striking out the name of a defendant after the plea, the costs to be paid to him are taxed as if he were a plaintiff. (c) And if a plaintiff, under the common rule, is allowed to amend, upon payment of twenty shillings, which changes the entire nature of the bill; as, by converting it from a bill for an account, against a

But a case often occurs where the plaintiff may amend, without any costs, after answer, though he requires a further answer; as where exceptions are taken to an answer, and are allowed, or submitted to; if the plaintiff thinks it expedient to amend his bill, he may obtain an order, as of course, to amend without costs, and that the defendant should answer the exceptions and amendments together; but the defendant may prevent the plaintiff from obtaining this advantage, by putting in an answer to the exceptions before the plaintiff's order to amend has been drawn up and served; (a) although the plaintiff had presented a petition for such order, of which application the defendant had notice. (b) But if the order to amend, and for the defendant to answer the amendments and exceptions at the same time, is obtained before the filing of the report, allowing the exceptions, it is irregular. (c)

This is the proper place for observing, that by the 29th of the General Orders of 1828, where the plaintiff is directed to pay to the defendant the costs of the suit, there the costs occasioned to a defendant, by any amendment of the bill, shall be deemed to be part of such defendant's costs in the cause (ex-

(a) *Partridge v. Haycraft*, 11 Ves. 578. *Bethuen v. Russell*, 577.
(b) *Leyburn v. Green*, 2
Bateman, 1 Dick. 296. *Paty v. Simpson*, 2 Cox, 392.
(c) *Ruston v. Troughton*, 2 Sim. 33.

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as to any amendment which may have been by special leave of the court, or which shall or to have been rendered necessary by the de- of such defendant); but there shall be de- d from such costs any sum or sums which ave been paid by the plaintiff, according to ourse of the court, at the time of any amend-

And, by the 30th of the same Orders, upon taxation, a plaintiff, who has obtained ee, with costs, is not allowed the costs of nendment of the bill, upon the ground of its g been unnecessarily made, the defendant's occasioned by such amendment, shall be and the amount thereof deducted from

and signed by counsel, and that such amendments are not intended to be made for the purpose of delay or vexation, but because the same are considered to be material to the case of the plaintiff; such affidavit to be made by the plaintiff, or one of the plaintiffs, where there is more than one, or his, her, or their solicitor, or by such solicitor alone, in case the plaintiff or plaintiffs, from being abroad, or otherwise, shall be unable to join therein; but no order to amend shall be made before replication, either without notice, or upon affidavits in manner hereinbefore mentioned, unless such order be obtained within six weeks after the answer, if there be only one defendant, or after the last of the answers, if there be two or more defendants, is to be deemed sufficient. But by the 19th Order, when the time for amending would expire in the interval between the last seal after Trinity term and the first seal before Michaelmas term, or between the last seal after Michaelmas term and the first seal before Hilary term, such time shall extend to, and include the day of, the general seal then next ensuing. And by the 14th of the General Orders of 1828, every order for leave to amend the bill, shall contain an undertaking by the plaintiff, to amend the bill within three weeks from the date of the order, and in default thereof, such order shall become void, and the cause shall, as far as relates to any motion to dismiss the bill for want of prosecution, stand in

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me situation, as if such order had not been

plaintiff may likewise (under the restriction after mentioned) amend after replication, when he must first obtain an order to withdraw his replication, excepting where the amendment is by adding a party, which might be done without such an order. (a) The motion to withdraw the replication, and amend the bill, was refused, unless some further proceedings had been had in the cause, or the plaintiff had undertaken to speed the cause ; thus, if rules have been made to produce witnesses, the motion to withdraw the replication, and the rules to produce

that the matter of the proposed amendment is material, and could not, with reasonable diligence, have been sooner introduced into the bill. Regularly after publication, the bill cannot be amended, except by adding parties, and which will be permitted to be done at any time before hearing. (a) Also, even at the hearing, if there should appear to be a want of parties, the court will permit the cause to stand over, with liberty to the plaintiff to amend by adding the necessary party; (b) this liberty to amend is generally granted upon the terms of the plaintiff's paying the costs of the day; (c) but in a case, where the answer did not state the want of parties, the court held, that the defendant is not entitled to the costs of the day. (d) But in a subsequent case, (*Hall v. Kirkman*), (e) the court decided that the costs ought to be paid by the plaintiff, although the objection was not noticed in the answer. And even where a matter has not been put in issue by the bill with sufficient precision, the court has, upon hearing the cause, given the plaintiff leave to amend the bill, for the purpose of making the necessary alteration. (f) And a mere

(a) Anonymous, 1 Atk. 51;
Goodwin v. Goodwin, 3 Atk.
370.

(b) *Herring v. Yoe*, 1 Atk.
289; *Yarroway v. Haud*, 2
Dick. 498.

(c) Anonymous, 2 Atk. 14.
(d) *Mitchell v. Bailey*, 3
Mad. 61.

(e) 1 Jac. 163.
(f) *Leslie v. Devonshire*, 2
Bro. C. C. 194.

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al error may be amended, even after a cause
ought to a hearing ; thus, where, in an infor-
n and bill, the cause was entitled as an in-
tion at the relation of the several persons
d, " on behalf of themselves, and all other the
ioners;" but as a bill by those individuals, as
iffs, without the additional words, on an ob-
n being taken on that ground, the Lord Chan-
thought it was competent to him to allow
mendment, even in that stage. (a) And
e plaintiff prays relief, to which he is not en-
, viz., a sale under a trust, instead of redemp-
or foreclosure as a mortgagee, although he
ot have the different relief under the general

of parties, with liberty to the plaintiff to amend, and the plaintiff struck out many charges in the bill, and adding new matter, and praying relief against the defendants generally, the court discharged the order, and directed the plaintiff's bill to be restored to what it was before, and the plaintiff to pay the costs occasioned thereby. (a)

After plea pleaded, and replication filed, although the plea is not set down to be argued, it is not a motion of course to withdraw the replication, and amend the bill ; but it is a special application ; for while the plea remains, the amendments cannot be made, without the court interposes to regulate the record, in order that it may stand right ; and if such an order is obtained, as a matter of course, the court will discharge the order, and direct the amended bill to be taken off the file. (b) If the plea or demurrer has not been set down to be argued, it is a motion of course for the plaintiff to be at liberty to amend his bill, on payment of twenty shillings costs. But if the plea or demurrer is actually set down to be argued, the order to amend is then obtained, upon payment not only of the ordinary costs of twenty shillings, but also

(a) *Bullock v. Perkins*, 1 Turn. 23; *Jennings v. Pearce*, 1 Ves. J. 447.
Dick. 110.

(b) *Carleton v. l'Estrange*, 1

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ve pounds beyond them. (a) If the plaintiff, on the plea comes on to be heard, declines amending it, stating his intention to amend his bill, which he is at liberty to do, the usual words in the order, "upon hearing and debate," must not, in this case, be inserted. (b)

In the case of a mere bill for a discovery, it is held that it cannot be amended by adding particulars. (c) and after answer to a bill for a discovery, the court refused to permit the bill to be amended by adding a prayer for relief. (d) And after answer to a bill for a discovery and relief, the court would not permit the bill to be amended by

stood. Thus, where a bill, having been filed by a number of persons, on behalf of themselves and other creditors of a banking-house, an order is obtained by A, one of the plaintiffs, to amend the bill, by striking out the names of the co-plaintiffs, but no amendment is actually made ; many years afterwards, the executors of A, not knowing that the record had not been amended, filed a bill of revivor, as if A had been the sole plaintiff ; and an order of revivor being obtained, moved in the revived cause for a receiver ; such a motion is irregular, notwithstanding that the order of revivor has not been discharged. (a) And it seems that, under such proceedings, an order to enter the order to amend *nunc pro tunc*, ought not to be made (if made at all) without making arrangement with respect to what has been done in the cause in the interval. (b)

The amendments are incorporated with the original bill, and form with it only one record ; but it is necessary, when a bill has been amended, after a full answer has been put in, to sue out a fresh *subpœna* to answer. (c) The defendant

(a) Hughes v. Dumbell, 1 Russell, 317.

(b) Ibid.

(c) Pennington v. Lord Mun-
caster, V. C. in the sittings after
Mich. T., 1817. By the 20th

of the General Orders of 1828,
service on the clerk in court of
any *subpœna* to answer an
amended bill, shall be deemed
good service. See also Cooke
v. Davies, 1 Turn. 309, 310.

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eight days after service of the order to
d, to put in a further answer to the amend-
s; before which time, plaintiff cannot file a
cation. (a) But if, after exceptions to the
er are allowed or submitted to, the bill is
ded, and the plaintiff obtains the usual order,
the amendments and exceptions shall be
ered together, a new *subpæna* is not neces-
(b) In general, the amendment of a bill
an end to all process of contempt for want of
swer, and the court will not allow a plaintiff
mend without prejudice to a previous seques-
n. (c) But it seems, that if a specific amend-
was proposed, and it appeared evident, that

the defendant's answer, he can compel the production of deeds and papers connected with the object of the suit. If such deed, or other writings, are specified in, and referred to by, the answer, and therein admitted to be in the defendant's custody or possession, the court will, upon motion, order the defendant to leave them with his clerk in court for the inspection of the plaintiff. (a) Thus the plaintiff is entitled to the production of maps and rentals admitted by the defendant to be in his possession, which elucidate the right of the plaintiff. (b) But the plaintiff has no right to the production of a deed which is not connected with his title, and which gives title to the defendant; (c) neither will the plaintiff be entitled to production, where he seeks an anticipated decree. (d) An attorney submitting to produce the title deeds of his client in his possession, as the court shall direct, may be called upon to produce them, if the principal could himself have been called upon to do so. (e) It is not necessary, that the defendant should have set out the deed in a

(a) *Earl of Suffolk v. Howard*, 2 P. W. 176. *Bettison v. Farrington*, 3 P. W. 364. *Croft v. Slee*, 4 Ves. 66. *Bird v. Harrison*, 15 Ves. 408. *Evans v. Richard*, 1 Swanst. 7.

(b) *Potts v. Adair*, 3 Swanst. 268, in note.

(c) *Sampson v. Swettenham*, 5 Mad. 16.

(d) *Lingen v. Simpson*, 6 Mad. 290.

(e) *Fenwick v. Reed*, 1 Mer. 114.

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rule ; an admission, generally, that he has little deeds of the estate in his possession, will be sufficient. (a) If it appears that the documents in the defendant has in his possession relate to other subjects, besides the matters in the cause, the defendant will be permitted to seal up the entries relating to the other subjects, making an affidavit that he has sealed such entries only. (b) If the defendant admits books, &c., in the West, to be in his possession, custody, or power, the court will order him to bring them here within a reasonable time ; and if they are not brought, it will be considered the same, as if he had them in the first instance, and refused to produce

defendant has a deed in his possession, in order that he might produce it before the examiner to be proved. (a) And if a deed is proved in a cause, and referred to in the depositions, the court will not order that the other side shall have leave to inspect it before the hearing. (b) Neither will the court order letters referred to by the plaintiff's depositions, as exhibits, (c) nor a deed mentioned by the plaintiff's bill to be in his possession, (d) upon the motion of the defendant, to be produced for his inspection; neither will the court, upon motion by the defendant, in a bill for a partnership account, direct the production of accounts before answer; (e) but it seems that, after answer, if he swears to his belief that the books are in the possession of the plaintiff, and that he, the defendant, cannot answer fully without them, then the court will restrain all proceedings for want of a sufficient answer, until he has been assisted with the inspection. (f) And the court will, upon the application of the defendant, before the answer, under special circumstances, order

(a) *Barnett v. Noble*, 1 Jac. and Walk. 227.

(b) *Davers v. Davers*, 2 P. W. 409.

(c) *Wiley v. Pistor*, 7 Ves. 411.

(d) *Anonymous*, 2 Dick. 778; *Micklethwaite v. Moore*, 3 Mer. 292.

(e) *Spragg v. Corner*, 2 Cox, 109. Sed vide *Wy. Pract. Reg.* 161.

(f) *Spragg v. Corner*, 2 Cox, 109. Sed vide *Wy. Pract. Reg.* 161. *Pickering v. Rigby*, 18 Ves. 484.

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the plaintiff should not compel the defendant to answer, until within a given time after the plaintiff has produced certain documents, stated in the bill, when it appears that the production is essential to enable the defendant to put in his answer. (a) And if the plaintiff suffers fifteen months to elapse without making the production, the plaintiff will be ordered to produce the instrument, on or before a certain day; and if the production is then made, the bill will be dismissed with costs. (b)

In a suit in the Court of Exchequer, by the Corporation of London, the defendant obtained an order to inspect the City books and their bye-laws.

it. (a) It is therefore reasonable to suppose, that the court will, at the instance of the party, who wishes to have the deed produced, and who must prove it when produced, direct that person to be at liberty to inspect the deed, to see, who are the attesting witnesses to it. Where it is necessary that an original will should be produced at the hearing, the court has been in the habit, on motion, to make an order on the register of the Ecclesiastical Court, to deliver out the original will, for the purpose of being produced at the hearing, upon giving security, to be settled by the Master, to return the will safe and undamaged. (b)

It often happens, that the plaintiff wants a discovery of deeds, to aid an action at law. If the bill be merely a bill for a discovery, in aid of such action, the plaintiff may, by motion, obtain an order for the production of such deeds, admitted by the defendant to be in his custody, as the former is entitled to the inspection of, and for the production of those deeds at the trial; but if the plaintiff prays for *relief* as well as discovery, the court will not, upon *motion*, aid the plaintiff in this way, in a proceeding not under its

(a) *Gordon v. Secretan*, 8 343; *Forder v. Wade*, 4 Bro. East, 548. C. C. 476; *Hodson v. Qualey*,

(b) *Williams v. Floyer*, Amb. 4 Mad. 213.

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rol. (a) Neither will the court, upon the same principle, upon *motion*, order that an outstanding should not be set up by the defendant against a judgment brought by the plaintiff. (b)

It may be useful to observe, that the court will, notwithstanding an abatement by death of almost all the parties, make an order for delivery of the records and writings in court, or send it to the Master for inquiry, to whom they belong, or order money to be paid out of the bank, without a revivor; that is, where the court must deliver itself from the custody thereof some way or other, and proceed *ex officio*. (c)

plaintiff, order such sum to be paid into court, upon the passages in the answer being read, by which the admissions in question are made. The most ordinary case of the sort is in a bill by legatees, or creditors, against an executor, where he admits, in his answer, that he has property of the testator in his hands, without showing that other persons have a prior claim to the fund in question, and that it is not more than sufficient to satisfy such demand (if any). The plaintiff may get this sum paid into court, generally without being under the necessity of showing, that the executor had abused his trusts, or that the fund was in danger from his insolvent circumstances.(a) And the defendant cannot protect himself from payment of the amount into court, by alleging that he has lent it upon a promissory note, paying interest.(b)

In general, a partner in trade admitting the receipt of money, but insisting there is a balance in his favour, will not be ordered to pay the sum in his hands into court; but if he has received it, contrary to good faith, and which he ought not to have received, he will be ordered to bring it into court.(c) If an executor admits a large balance of the personal estate to be in his hands, he will

(a) *Strange v. Harris*, 3 Bro. C. C. 365.

(c) *Foster v. Donald*, 1 Jac. and Walk. 252.

(b) *Vigrass v. Binfield*, 3 Mad. 62. See *Cooper*, 6.

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ordered to pay the whole into court, although
ates an action at law is depending against him
debt, to a considerable amount, due from
estator; but with liberty, in case the plain-
n the action should recover, to apply to the
to have a sufficient sum paid out again; and
e plaintiff in the action recovers, the court
order the amount, to be paid out to the plain-
the action, and not the executor. (a) So, if
xecutor admit a balance due from him to the
or, upon an unsettled account, he will be
ed to pay the amount into court, notwith-
ing there are debts of the testator still out-
ing, if the testator has been dead three years

court. (a) But, although a defendant makes an admission which would entitle the plaintiff to a decree, the plaintiff cannot, for that reason, move for payment of the money into court. (b)

Although the court has no authority to make any compulsory order on any person not a party to the suit, yet the court will order that a person who had received money on behalf of the plaintiff, before that suit, although not a party, might be at liberty to pay the amount into court. (c) Though it seems that, formerly, for the purpose of getting money paid into court by the defendant, it must have appeared upon his *answer* to have been due, yet now the court will direct it to be done, if the money appears to be due by the *examination* of the defendant in the Master's office; and in both cases the court will order this to be done, although the party himself has not cast up his schedules; but the result or balance must be clearly verified by affidavit. (d)

The sum calculated for interest will not be allowed to be taken into the account. (e) But

(a) *Widdowson v. Duck*, 2 Ves. 177. See *Fox v. Mackreth*, where the court refused to
Mer. 499.

(b) *Peacham v. Daw*, 6 Mad. 98. make an order for the payment
of the balance till the report, 1

(c) *Francis v. Collier*, 5 Ves. 69.

Mad. 75. (e) *Wood v. Downes*, 1 Ves.

(d) *Quarrell v. Beckford*, 14 and B. 49.

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re a defendant, by his answer, admits that he received a principal sum, and *interest* to a later amount, he will be ordered, on motion, to pay in the interest. (a) If the report, by which a sum is stated to be due from a party, is excepted by the court will, not pending the exceptions, order the money to be paid in; but where it is evident that an exception is taken merely for delay, the party on the other side may make an application for the immediate hearing of the exception. (b) And if, by new interrogatory, the plaintiff extracts an admission of a new sum to be in the defendant's hands, it will be ordered to be paid into court. (c)

An instance has occurred, where the defendant has been ordered to pay money into court, *before* answer, in case of gross fraud, upon an admission of the sum in his hands, in the affidavit made by him, in answer to the plaintiff's affidavit in support of the motion. (a)

And it may be useful to add, that if an executor admits assets, and a balance is paid into court, and laid out, the court will, on motion, order the income of it to be paid to the person entitled to the residue. (b)

The court will also, upon motion, order the purchaser of an estate, being in possession under the agreement, to pay the purchase money into court, where the purchaser has approved of the title; (c) or, even in a case where it appeared on the face of the abstract, that the title was bad, but the purchaser had sold the estate to another purchaser; (d) or where a time was fixed for payment of the purchase money by instalments, and the property was a coal-mine, and the defendant was making a benefit by working the mine; (e) or where the purchaser exercises acts of ownership on the es-

(a) *Jervis v. White*, 6 Ves. 738.

(b) *Dands v. Dands*, 1 Sim. 510.

(c) *Walters v. Upton*, Coop. 92, in note. *Boothby v. Walker*, 1 Mad. 197.

(d) *Booth v. Ketley*, Sudg. Vend. and Purch, 7th edit. 213.

(e) *Buck v. Lodge*, 18 Ves. 450.

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as by cutting down timber and underwood. (a) If, by the terms of the contract, the purchaser is to have possession, before the conveyance is executed, the mere fact of his taking possession under the agreement, will not entitle the vendor to call on him for payment, and on this ground, the vendor has a lien on the estate for the amount. (b) But even in such a case, the court will not permit a purchaser in possession to commit acts of ownership, tending to alter the nature of the property, which constitutes the security of the vendor. (c) And affidavits, under those circumstances, have been allowed to show that acts of this nature have been committed, even though

But it is proper here to observe, that in the case of *Bramley v. Teal*, (a) Sir John Leach, Vice Chancellor, appears to make a distinction between an act done by the purchaser, which deteriorates the estate, and an act done by him, which ameliorates it: in the former case, his Honour observed, that the purchaser should pay his money into court, because he diminishes the value of the lien, which the vendor has upon the estate for the purchase money; but that where the estate is ameliorated, the value of the lien is increased, and the vendor's security improved. However, his Honour, notwithstanding the acts done by the purchaser in the above case, might be considered to ameliorate the estate, upon the authority of *Cutter v. Simons*, and as nobody appeared on the motion, made the order on the purchaser to pay the purchase money into court. (b) And where the acts of ownership tend to alter the nature of the property, (c) or where the defendant obtained the possession without the consent or privity of the vendor, (d) and although the defendant has not submitted the merits of the case to the court by affidavit, (e) the court will, even before answer, direct the purchase money to be

(a) 3 Mad. 219.

(d) *Blackburn v. Stace*, 6

(b) See *Gell v. Watson*, 3 Mad. 69.

Mad. 225.

(c) *Ibid.*

(e) *Dixon v. Astley*, 1 Mer.

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in. (a) And although the application is made after answer, yet affidavits may be read and the acts done, tend to alter the nature of the property, in support of the motion. (b)

but if the vendor permits the vendee to take possession before the completion of the title, without stipulation as to the purchase money, (c) or if possession of the purchaser is not under the contract of purchase, but prior to, and independent of it, (d) the purchaser will not be compelled to pay his purchase money into court, particularly where there has been laches in the vendor in making his title. (e) And cases may happen, where,

mutual surprise, the court will not permit him to retain possession, withholding the money. (a)

If the court is satisfied that the order applied for, ought to be made, the party is directed to pay the money into court, on a certain day named in the order, the practice of ordering it to be paid "forthwith" being altered. (b) Any of the parties in the cause, interested in the money ordered to be paid into the Bank, may apply to the court, that such money may be laid out and invested in the three per cents consols, for the benefit of the persons, who shall be found entitled thereto ; but there must be a certificate, not only that the money was paid into the Bank, but that it is actually in the Bank at the time of the application made. (c)

SECTION VI.

Appointment of Receiver.

The appointment of receiver is likewise frequently the subject of an application to the court, upon the coming in of the answer. He is a person appointed by the court to receive the

(a) *Gibson v. Clarke*, 1 Ves. and B. 500.

(b) *Higgins v. ———*, 8 Ves. 381.

(c) *Anonymous*, 1 Atk. 519.

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as and profits of land, or the profits or produce of other property in dispute. He is considered as an officer of the court, and, therefore, when he is in possession, an ejectment cannot be brought without leave of the court. (a) The court has no jurisdiction to appoint a receiver, unless a cause is depending; the jurisdiction which the court exercises, with respect to idiots and lunatics, is a particular one. (b) The court will not appoint a receiver in the case of an infant without bill: see title "Petitions." In general, the court will not appoint a receiver, unless the bill prays for one. But after a decree, the court may do it, although a receiver be no part of the

cutor wasting the assets. (a) In the two last cases, the court has often been induced to appoint a receiver before answer, (b) upon sufficient affidavits. But it is proper to remark, that the old rule seems to have been, not to grant a receiver before *answer*; but this rule was first broken through by Lord Kenyon; (c) but the order then made for a receiver before answer, has been followed since, when justice required it, and the merits appeared by affidavit. (d) But the mere fact that the executor is in mean circumstances, is not sufficient. (e)

The court will appoint a receiver of personal estate, if there is a dispute in the Ecclesiastical Court, concerning the probate, notwithstanding that court may grant administration *pendente lite*, (f) as well where the litigation there is to recall probate or administration, as where no probate or administration had been grant-

(a) Middleton v. Dodswell, 172. Ex-parte Shakeshaft, 3 Bro. C. C. 198. Edmunds v. 13 Ves. 266.

(b) Ibid. Bird, 1 Ves. and B. 542.

(c) Vann v. Barrett, 2 Bro. Ball v. Oliver, 2 Ves. and B. C. C. 158. 96. Atkinson v. Henshaw, *ibid*.

(d) Duckworth v. Trafford, 85. Sed vide Wy. Pract. Reg. 18 Ves. 283. Metcalfe v. Pul- 356. Knight v. Duplessis, 1 vertoff, 1 Ves. and B. 180. Ves. 325. Hathornthwaite v.

(e) Anonymous, 12 Ves. 4. Russell, 2 Atk. 126. Richards

(f) Montgomery v. Clark, 2 v. Chave, 12 Ves. 462. Atk. 378. King v. King, 6 Ves.

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a) or where the husband of an executrix is of the jurisdiction of the court, and where there can be no remedy against her, if she should waste the assets, as the husband must be joined in suit. (b) The court will not interfere, where there is no statement in the bill, that the suit is pending in the Ecclesiastical Court: the mere statement that the executors have not proved the will, though they have attempted to do so, is not sufficient. (c) The court will not interfere, merely on the ground that the defendant opposes the plaintiff's application for administration, no grounds being stated for that opposition; where nothing appears to show that administration would not be ob-

carry it on; (a) therefore the court will not appoint a receiver of a partnership unless it appears that the plaintiff will be entitled to a dissolution at the hearing. (b) But it may be a question, whether the court will not restrain a partner, if he has acted improperly, from doing certain acts in future, although the partnership is not to be dissolved. (c) As in the ordinary course of trade, if any of the partners seek to exclude another from taking that part in the concern, which he is entitled to take, the court will appoint a receiver; so, in the course of winding up the affairs, after the determination of the partnership, the court, if necessary, interposes on the same principle. (d)

Also, a receiver has been appointed in a suit, for the specific performance of an agreement to purchase an estate, against the purchaser, after an answer, upon the lien for the remainder of the purchase money, and where there has been a mixed possession, and his insolvency and intention are admitted. (e) And the court has made the same order, pending a reference to

(a) *Waters v. Taylor*, 15 Ves. 10, 329. *Goodman v. Whitcomb*, 1 Jac. and Walk. 589.

(b) *Goodman v. Whitcomb*, 1 Jac. and Walk. 589 and 592.

(c) *Ibid.* 592.

(d) *Wilson v. Greenwood*, 1 Swanst. 481.

(e) *Hall v. Jenkinson*, 2 Ves. and B. 225.

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Master, where the property consisted of buildings and offices, on which it would be necessary to effect insurances, and of ornamental grounds, which required considerable expenditure and attention, and all the defendant's objections to the title had been answered. (a)

The court interposes with great caution in appointing a receiver of the rents and profits of land, against the legal title; (b) generally, it will not do so against the first mortgagee in possession, at the instance of a subsequent incumbrancer; but it will, if the first mortgagee refuses to swear that there is any thing due to him. (c)

right of the mortgagee taking possession. (a) A receiver also may be appointed on motion in favour of equitable creditors, or of persons having equitable estates, without prejudice to persons having prior estates, provided that the court is satisfied in that stage of the cause, that the relief prayed by the bill will be given, when a decree is pronounced. (b) And if a defendant, on an advance of money, agrees to execute a mortgage of land, but does not perform his agreement, and there is an arrear of interest due on the money advanced, the court upon motion will grant a receiver, because if the defendant had performed his agreement, the plaintiff would have been entitled to bring an ejectment. (c) And where the profits of an office are assigned for the payment of debts, and a suit instituted to compel the execution of the trusts, the court will appoint a receiver, pending the question of the validity of the agreement. (d)

The court likewise will appoint a receiver of the rents of a real estate, in a case of fraud,

(a) *Bryan v. Cormick*, 1 Cox, 423. *Dalmer v. Dashwood*, 2 Cox, 378. *Berney v. Sewell*, 1 Jac. and Walk. 649. See *vide Phipps v. Bishop of Bath and Wells*, 2 Dick. 608.

(b) *Davis v. the Duke of Marlborough*, 2 Swanst. 137, 138.

(c) *Shakel v. the Duke of Marlborough*, 4 Mad. 463.

(d) *Palmer v. Vaughan*, 3 Swanst. 173.

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ly proved in obtaining a conveyance of
(1) *where the defendant is a trustee of the plaintiff's property*
and if, in a bill, against an infant heir, by creditors, to have assets descended to him, applied in satisfaction of their debts, the plaintiff demurs, the court will appoint a receiver. (b) And the appointment has been made, at the instance of a tenant in common against another; (c) but a bill of exclusion must be clearly made out. (d) where, in a creditor's suit, it appears that the estate must be responsible, there being no personal estate, a receiver will be appointed in the early stage of the suit. (e) And the court will,

waste. (a) But if there is not time to make the motion on the day, for which the notice was given, or if it stands over at the defendant's request, and the answer is put on the file on the day, when the motion was to have been made, after the sitting of the court, it seems that the affidavits in support of the motion, filed before the notice, may be read, though the answer was put in before the motion was actually made, as the answer will be considered as an affidavit. (b) The answer of a co-defendant, on a motion for a receiver, if a material defendant has not answered, will be regarded as an affidavit, and the plaintiff may read affidavits against it. (c) But if the mortgagee in possession has said that there is any thing due to him, the court will not try, upon affidavit against the answer, whether that was true or not. (d)

The court being satisfied of the propriety that a receiver should be appointed, refers it to a Master to consider of a proper person to discharge that office. For that purpose, a proposal is laid before the Master of some fit person for it, and of two sureties for him. The Master is to appoint a person whom he thinks most fit, without regard to

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| (a) <i>Norway v. Rowe</i> , 19 Ves. 144. Sed vide <i>Peacock v. Peacock</i> , 16 Ves. 49. | (c) <i>Kershaw v. Matthews</i> , 1 Russell, 361. |
| (b) <i>Godman v. Whitcomb</i> , 1 Jac. and Walk, 589. | (d) <i>Roe v. Wood</i> , 2 Jac. and Walk, 557. |

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fact, who might propose or recommend him. (a) A stranger cannot propose a receiver. (b) It was a question, but not decided on, in the Attorney General v. Day, (c) whether, if the parties neglect to propose a receiver, the Master can propose one, or whether an application ought not to be made to the court. However, in that case, where the neglect of the parties was accounted for, the Master was directed to review his report, and give their proposal of a receiver. A peer of the realm, although offering to act without fee, (d) a receiver general of a county, (e) the next friend of an infant plaintiff, (f) a solicitor in the cause, or even a commission of lunacy, (g) or a Master in

mortgagee of a West Indian estate, who does not take possession, will not be appointed consignee by the court, unless the mortgage debt contains a covenant for that purpose. (a) But there is no objection to a practising barrister. (b) Nor is it a positive disqualification, that a man is a member of the House of Commons. (c) The Master having made the appointment, there must be some substantial objection to induce the court to overturn it. (d)

If, on the appointment of a receiver, the owner of the estate is in possession, application should be made to the court, that he deliver possession to the receiver; (e) but the latter cannot distrain on the owner in possession, as he is not tenant to the receiver. (f) The appointment of a receiver in an adversary suit, is turning a party out of possession: but it is not so in every case; for instance, where an infant is entitled, there is no colour to say, the appointing a receiver puts the infant out of possession. (g) And if a person sets up a claim to the estate, he may be ordered to come in, and be examined *pro interesse suo*, as in the case of a

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| (a) Cox v. Champness, Jac. | J. 452; Tharpe v. Tharpe, 12 Ves. 317. |
| (b) Garland v. Garland, 2 Ves. J. 137. | (e) Griffith v. Griffith, 2 Ves. 401. |
| (c) Wynne v. Lord Newborough, 15 Ves. 283. | (f) Griffith v. Griffith, 2 Ves. 401. |
| (d) Thomas v. Dawkin, 1 Ves. | (g) Sharp v. Carter, 3 P. W. 379. |

Appointment of Receiver.

sequestration. (a) And after a receiver is in position, other persons are not permitted, without leave of the court, to enter under a claim of a right of common, which has not been previously decided. (b) The appointment of a receiver discharges a sequestration. (c)

the person appointed receiver, and the sureties, to enter into recognizances duly to account. As a manager of an estate in the West Indies is a security to account for the produce, and to sign, so far as the management requires it; he has a discretion as to what is to be applied to the estate. (d) But if a testator appoints a person here

the court directed inquiries as to the circumstances under which the expenditure was made ; (a) and it appearing that the expenditure was for the lasting benefit of the estate, and by the direction of the trustees, he was allowed it. (b) But now, by the 64th of the General Orders of the 3rd April, 1828, it is directed, that in every order, directing the appointment of a receiver of a landed estate, there be inserted a direction, that such receiver shall manage, as well as set and let, with the approbation of the Master ; and that in acting under such an order, it shall not be necessary that a petition be presented to the court in the first instance ; but the Master, without special order, shall receive any proposal for the management or letting the estate for the parties interested, and shall make his report thereon, which report shall be submitted to the court for confirmation, in the same manner as is now done with respect to reports on such matters made upon special reference ; and until such report be confirmed, it shall not give any authority to the receiver.

Where a tenant has held over after notice, a receiver giving notice to quit or pay double rent, is held at law, “an agent lawfully authorized,” to entitle the landlord to the double value of the pre-

(a) *Blunt v. Clitherow*, 6 Ves. 799. *Attorney General v. Vigor*, 11 Ves. 563. (b) *Blunt v. Clitherow*, 6 Ves. 799.

Appointment of Receiver.

under the statute 4 Geo. II. c. 24. (a) A receiver cannot proceed in an ejectment without the court's authority. (b) Upon an application by a receiver for leave to defend an ejectment, and to recover the costs, although the parties were not, and consenting, yet the court would go no further, than make a reference to the Master, to inquire whether it would be for their benefit. (c) But it is not necessary to obtain an order of the court, in order to distrain for rent, unless it is doubtful who has the legal right to the rent, (d) or unless the rent has been in arrear for more than one year. (e)

an order of the 15th of December, 1792, (f)

in, or such part thereof as the Master shall certify proper to be paid by them. And it is further ordered, that with respect to such receivers as shall neglect to deliver in their accounts, and pay the balances thereof at the times so to be fixed for that purpose, as aforesaid, the several Masters, to whom such receivers are accountable, shall, from time to time, when their subsequent accounts are produced to be examined and passed, not only disallow the salaries therein, claimed by such receivers, but also charge them with interest, after the rate of 5% per cent. per annum, upon the balances so neglected to be paid by them during the time the same shall appear to have remained in the hands of such receivers. And it is further ordered, that every receiver, acting under the authority of this court, shall, in each year, procure his annual accounts of receipts and payments respecting the estates entrusted to his care, to be examined and settled by the Master, whose duty it may be to inspect the same, within the space of six months next ensuing, the time appointed by such Master for the delivery of such account into his office as is hereinbefore directed. And in case any receiver shall, at any time hereafter, neglect so to do, a certificate of every such default is hereby required from the Master in whose office such neglect or default shall happen. And it is ordered that this order be entered with the register, and copies of it stuck up in the different offices.

Appointment of Receiver.

A receiver does not pay in his balance under an order for that purpose, either his recognizance may be set aside in suit, or he may be committed; but in the latter case, a previous order must be obtained, directing that he should pay, by a certain day, or stand committed. (a)

After a receiver has passed his accounts with the Master, the court will, upon the Master's certificate, that he has duly accounted, order his recognizances to be vacated; but, till then, the court will not discharge the sureties, upon their request, unless it be for the benefit of the estate in the cause. (b) Although a surety has

under a great mistake, in supposing they are not to pay in their balances, until some person obtains an order for that purpose. A receiver may pay in money upon his own application. By the 63rd of the General Orders of 3rd April, 1828, the Masters, in acting upon the order of the court, of 23rd April, 1796, shall be at liberty, upon the appointment of a receiver, or at any time subsequent thereto, in the place of annual periods for the delivery of the receiver's accounts, and on payment of his balances, to fix either longer or shorter periods, at his discretion; and when such other periods are fixed by the Master, the regulations and principles of the said order shall, in all other respects, be applied to the receiver.

SECTION VII.

Injunction.

The subject of injunction, as far as it relates to the practice of the court, divides itself into five heads; 1st, those injunctions which may be obtained as of course; 2nd, the effect of those injunctions; 3rd, those which are obtained upon a special application; 4th, the service of injunctions, and commitment for breach of them; 5th, the dissolution of them.

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If the injunction prayed for by the bill, is by proceedings at law, (a) it will be granted of course, without notice, and without affidavit of service, unless the defendant is abroad, immediately (b) upon an attachment for want of appearance or of an answer, or upon a *dedimus* obtained from the court, or upon a writ of habeas corpus, if the defendant to take his answer in the court, or upon his praying for time to answer. (c) The answer must be on the file, at the latest, by eight o'clock in the evening, before the day, to prevent the attachment issuing. (d) Beware of mistake as to the office hours, even where the answer was sworn the day before, and was filed at the earliest possible moment on the seal day,

for an injunction on that day. (a) And if the further answer of a defendant is sworn at the Master's house, and filed in the six clerks' office, in the evening of the day on which the Master had reported a former answer insufficient, the plaintiff is not regular in obtaining, the next day, the order for the common injunction on the Master's report. (b)

The above rule, stated in page 324, applies to the case of an amended bill, if no injunction has been before obtained, or applied for, (c) and the defendant is not abroad; but if a plaintiff amends his bill, after an injunction previously obtained has been dissolved upon the merits, or for want of the plaintiff showing cause why the injunction should not be dissolved on the defendant's order nisi, (d) or after an injunction has been refused upon the merits, when applied for on the coming in of the answer, (e) or where the injunction is lost by amendment; (f) in these cases, the contempt of the defendant, in not answering the amendments, or his praying for an order for time

(a) *Rowe v. Jarrold*, 5 Mad. 45. *wards v. Jenkins*, 3 Bro. C. C. 425.

(b) *Duckworth v. Boulcott*, 3 Swanst. 266. (e) *Kinnear v. Lomax*, in the Exchequer, in Hil., 1812; *Bliss v. Boscawen*, 2 Ves. and B. 102.

(c) *Nelthorpe v. Law*, 13 Ves. 323. 3 Barnard, 332. (f) *Home v. Watson*, 2 Sim. 85.

(d) 3 Atk. 694; *Travers v. Lord Stafford*, 2 Ves. 19; Ed-

Injunction.

wer them, or a *dedimus* to take the answer in country, will not entitle the plaintiff to an action of course. The same rule applies to a supplemental bill, with new matter, which is part of an old case. (a) But a plaintiff may obtain an injunction on his amended bill, notwithstanding a former injunction has been dissolved, upon the bringing in of the answer to the original bill, upon special application, and upon an affidavit of the plaintiff, and upon the defendant praying a *dedimus*, on his being in default for want of answer. (b) It is not necessary that an attachment should have been sealed. (c)

junction as of course, for the want of an answer ; but the plaintiff is in the same situation, as if the time for answering was not out ; in which he must move it upon notice, and affidavit of circumstances. (a)

If the defendant is *residing abroad*, when the injunction is applied for, the plaintiff must support the material facts alleged in the bill by an affidavit: (b) and if, in that case, after an answer is put in to the original bill, on which the plaintiff neither moved for an injunction, nor excepted, he amends his bill, the court will not grant an injunction, for want of an answer to the amended bill, unless the plaintiff not only verifies the amendments by affidavit, but likewise satisfactorily accounts to the court why the new facts were not put into the original bill. (c) If there are several defendants residing abroad, the court will not grant the injunction, upon one of them being in contempt, for want of an answer, until there is an appearance, or default of an appearance, of the rest, notwithstanding the usual affidavits of merits. (d)

It is proper to add, that in the case of an interpleading bill, an injunction for want of an answer

(a) *Neale v. Wadson*, 1 Bro. C. C. 574 ; 1 Cox, 104.

(b) *Norris v. Kennedy*, 11 Ves. 567.

(c) *Norris v. Kennedy*, 11 Ves. 565.

(d) *White v. Klevers*, 18 Ves. 471.

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not be granted, without the plaintiff's bringing money in dispute into court. (a) But the plaintiff, in this suit, may move at once for a special injunction, on payment of money into court, without first obtaining the common injunction, (b) and without supporting his motion by an affidavit of facts. (c)

and. If the defendant is, at the time when this injunction is obtained, in a condition to demand a verdict, that is, if he has actually delivered his declaration, the injunction, in the terms of it, gives liberty to call for a plea, and to proceed to trial, and for want of a plea, to enter up judgment,

court intends to stop by the injunction ; therefore, after judgment against an executor *de bonis testatoris quando acciderent*, the plaintiff may, notwithstanding an injunction served on him, after declaration, take out a *scire facias*, in order to an inquiry of assets, such process being only in nature of a proceeding after an interlocutory judgment to a final one. (a) If a judgment is entered up against two obligors, in a joint and several bond jointly, and a common injunction is obtained in a bill by one of them, suing out execution, and taking the other obligor thereon, if the sheriff's officer is directed to take only the latter, is not a breach of the injunction. (b) So in the case of an injunction, for want of an answer, restraining the defendant from all proceedings at law against the plaintiff, on an award for payment of money, if the award is made a rule of a court of law before the injunction, the defendant may not only obtain a rule to show cause, but may go on to make his rule absolute for the attachment, without being guilty of a breach of the injunction ; for the making the award a rule of the court is to be considered as the commencement of the proceedings ; and the case, therefore, is to be governed by the same rule which applies to the common case of an injunction to restrain an action, which, if an

(a) *Morrice v. Hankey*, 3 P. W. 143.

(b) *Chaplin v. Cooper*, 1 Vcs. and B. 16.

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has actually been commenced, only re-
s execution. (a) But if the plaintiff at law
ved with, and has notice of, the injunction,
he has delivered his declaration, the injunc-
then stays all proceedings in the action;
ore, the arrest of the defendant, (b) obtaining
upon the sheriff to bring in the body, after
l bail excepted to, (c) or the delivery of a de-
on, (d) or proceeding against bail by giving
notice of declaration; (e) or suing out, by the
lant, a writ, to compel the sheriff to make the
roclamation, where the plaintiff had obtained
mmon injunction, after four proclamations
een made under an exigent issued in an

It is necessary here to state, that the common injunction, of which we are now speaking, does not extend to stay distress for rent, because it may be stopped by *replevin*; (a) nor to stay proceedings in the spiritual court. (b) So that, whenever proceedings of such descriptions are to be stayed, the injunction is to be moved for specially; and it seems, the same rule holds with respect to proceedings in the Court of Admiralty, (c) and the Court of Sessions in Scotland. (d) Under *special* circumstances the court has restrained proceedings in the latter court. (e) But a commission, by the court to examine witnesses abroad, in an action restrained by the common injunction, is considered as a step in the proceedings at law, and, as such, restrained by the injunction. (f)

Though it has been observed, that the common injunction gives leave to the plaintiff at law, if he has delivered his declaration to proceed to trial, yet the court will extend the injunction to stay

(a) *Hughes v. Ring*, 1 Jac. and Walk. 392.

(b) *Anon.* 1 P. W. 300.

(c) *Ibid.*; *Reed v. Bowyer*, in the Exchequer, in Trin. T., 1814.

(d) *Bush v. Munday*, 5 Mad. 297.

(e) *Ibid.*; *Colman v. Duke of*

St. Albans, 3 Ves. 27; *Eden on Injunctions*, 142; see also *Packhurst v. Lowten*, 2 Swanst. 213; but see *Smith v. Pemberton*, 1 Cha. Ca. 67; *Nela* 103; 2 *Freeman*, 125.

(f) *Noaves v. Dorrien*, 4 Mad. 362.

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Upon affidavit by the defendant at law, that he believes that the answer from the plaintiff at law will afford him material defence to the action. (a) The court will grant the motion, though the defendant, by the rules of the court, must answer before the trial can take place; (b) the affidavit need not be particular as to the facts expected; (c) unless the defendant is advised, when it seems that there should be special inquiry, to show that the discovery required from the plaintiff is material. (d) But an affidavit, merely stating that the plaintiff is advised, and believes, that he cannot safely go to trial without the answer, is insufficient; but the affidavit must go further.

time before his answer could be got in; (a) but the application has been refused, when made just previously to the time of the assizes, (b) and where, in addition, there has been great delay, with costs. (c) But where the answer, which was filed the same day on which the motion was made, and the trial was coming on the next day but one, was insufficient, the motion has been granted. (d) It is proper also to add, that an injunction to stay trial, cannot be had in the first instance. The common injunction must be first obtained, and an application made to extend it to stay trial. (e) But, under circumstances, an injunction to stay trial has been granted in the first instance; as where a demurrer had been filed, and the argument of it had been postponed by the absence of the defendant's counsel; so that, when the demurrer was overruled, the plaintiff had lost the opportunity of moving for the common injunction, and the extension in time, to stay trial, and the office copy of the answer, could not be procured early enough to produce it in evidence;

(a) *Rivet v. Braham*, in Chancery, July, 1789.

(b) *Blacoe v. Wilkinson*, 13 Ves. 454. *Field v. Beaumont*, 3 Mad. 102. *Field v. Beaumont*, 1 Swanst. 204.

(c) *Field v. Beaumont*, 3 Mad. 102.

(d) *Munnings v. Adamson*, 1 Sim. 510.

(e) *Wright v. Braine*, 3 Bro. C. C. 87. *Garlick v. Pearson*, 10 Ves. 450.

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special application to restrain the defendant from proceeding to trial, the court made the order. (a) If an answer has been put in before the motion is made, it is, in general, an objection to the application, provided the answer be filed before eight o'clock in the evening of the day preceding the seal day, supposing the motion to be made on a seal day; (b) therefore, if the answer is filed till the seal day, although, in point of time, before the motion was made, it will not prevent the motion from being granted. (c) And if objections are taken to that answer, and submitted to the court will make the order, an insufficient answer being as no answer. (d) An injunction

to an action, the plaintiff having obtained the common injunction, for want of an answer, is entitled to a commission, and to extend the injunction to stay the trial, after the return of the commission, or further order. (a) When the original injunction is dissolved, the order to extend it to stay trial falls with it, without any motion for that purpose. (b)

3rd. Special injunctions are those which are granted only upon special applications; (c) but it seems that a *subpœna* must be filed previous to the application. (d) These injunctions are applied for, sometimes on affidavits, before answer; sometimes upon the merits disclosed in it. In pressing cases, these injunctions may be obtained in the vacation, when the court is not sitting, on the filing of the bill, upon a petition to the Chancellor or Master of the Rolls, upon an affidavit, supporting the material allegations in the bill. The instances, in which the injunctions before answer are granted, are those where the injury, which is sought to be prevented, is of so urgent a nature, that great mischief may ensue, if the plaintiff were to wait till the answer is put in, as to stay

(a) *Bowden v. Hodge*, 2 Con's General Orders. Beam. Swanst. 258. Cha. Ord. 16.

(b) *Bishton v. Birch*, 2 Ves. and B. 40. (d) *Attorney General v. Nichol*, 16 Ves. 338.

(c) See 28th of Lord Ba-

Injunction.

(a) to restrain the negotiation of a bill of exchange, where it has been fraudulently, or illegally obtained; (b) or given for money won at play, although it is absolutely void at law; (c) to prevent a personal representative from dissipating assets, where he is wasting them, (d) where insolvent; (e) or where he has declared an intention to abscond; (f) or to prevent the infringement of a copyright; (g) or of a patent; (h) or a defendant from being inducted to a conveyance; (i) or from selling diamonds, to which the plaintiff has a claimed title; (k) or to restrain a vendor from conveying the estate contracted to be sold, to another person. (l) But where an injunction is

the party making the application, to swear, at the time of making it, as to his belief, that he is the original inventor. (a) Likewise, in the case of waste, and of other cases of analogous nature, the court will grant the injunction without notice, and before appearance, and before *subpœna* served, (b) provided the plaintiff makes an early application to the court, after the injury complained of, has happened. And in urgent cases of such description, the court will sometimes interfere, upon an *ex-parte* application, even after appearance; but then the appearance must be stated. (c) But, in general, if the motion is made after *appearance*, notice is necessary. (d) However, an *ex-parte* application for an injunction against waste will not be prevented by appearance the day before the motion. (e) On these applications, affidavits must be filed, verifying the material facts stated in the plaintiff's bill, and especially his title to the property in question. And in the case of waste, a particular title to the estate must be set out in the affidavit. (f) The court will not grant an injunction to stay waste, where the waste complained of

(a) *Hill v. Thompson*, 3 Mer. Ves. 112. Wy. Pract. Reg. 624. 236. *Collard v. Cooper*, 6

(b) *Smith v. Haytwell*, Mad. 190. *Ambl.* 66.

(e) *Aller v. Jones*, 15 Ves.

(c) *Harrison v. Cockerill*, 3 Mer. 1. 605.

(f) *Whiteleg v. Whiteleg*,

(d) *Maraser v. Boiton*, 2 1 Bro. C. C. 57.

Injunction.

remely trivial, and the plaintiff has been
y. (a)

the court will not grant a special injunction
rain the defendant from suing out an exe-
, upon a judgment at law, upon the ground
e defendant would be entitled to sue out
ion, before the plaintiff could obtain the
on injunction. (b) But if the party had no
unity of obtaining the common injunction,
n judgments entered upon warrants of at-
, a special injunction, upon affidavit of the
al facts, may be obtained. (c)

have defended himself; as if the plaintiff at law recovers a debt against the defendant, and the defendant afterwards finds a receipt in the plaintiff's own hand-writing, for the very money in question. (a)

If the bill does not pray for an injunction, the plaintiff cannot move for an injunction under the prayer for general relief; (b) but, after a decree, if the party is doing an act in defiance of it, likely to be attended with irreparable mischief, the court will enjoin him, although there was no prayer for an injunction; but if, in a bill for an injunction, the court decrees that the defendant should bring an ejectment, the plaintiff is still at liberty to set up an outstanding term; and the court cannot afterwards, upon motion, by the defendant, restrain him from setting it up; but he must file a new bill for that purpose. (c) To this it may be added, that if an injunction has been obtained upon a bill, filed after execution executed, the goods not being out of the hands of the sheriff, and he proceeds to sell without process, he will be ordered to pay the money into court. (d) It was formerly the practice to make the sheriff a

(a) *Countess of Gainsborough v. Gifford*, 2 P. W. 425.
Sed vide *Protheroe v. Forman*, 2 Swanst. 233.

(b) *Savory v. Dyer*, Ambl. 70.

(c) *Blackenbury v. Blackenbury*, 2 Jac. and Walk. 391.

(d) *Franklyn v. Thomas*, 3 Mer. 231.

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y a supplemental bill, if the money has
to his hands, since the injunction issued,
iginal bill, if the money was in his hands
ime. But this practice has been discon-
and where the plaintiff in equity had been
execution, and discharged out of custody
ge's order, on payment of money levied,
hands of the Master, and the plaintiff
ds obtained the common injunction, the
was allowed, on a motion by defendant to
the injunction, to apply to the court of
ave the money paid over, upon terms of
t into the Bank to abide the event. (a)

ruled, and in the mean time, pending the demurrer, the plaintiff is taken in execution, the plaintiff having, upon the demurrer being overruled, obtained the common injunction, may obtain an order upon the defendant, to discharge him out of custody, upon the ground that the plaintiff is to be considered as having an equitable case from the first to prevent execution. (*a*)

The general rule is, that for the purpose of obtaining or continuing an injunction, affidavits cannot be read against the answer. But there is an exception to this rule, in the case of waste, (*b*) and of an infringement of a patent, (*c*) and in the cases of mischief, analogous to waste; (*d*) but the exception does not extend to questions of title, (*e*) nor to the case of an injunction to prevent the negotiating of a bill of exchange; (*f*) and even in the case of waste, although an injunction obtained upon affidavits before answer may be sustained on affidavits subsequently filed against the answer, yet where

(*a*) *Franklyn v. Thomas*, 3 Mer. 225. case of *Berkeley v. Brymer*, 9 Ves. 356.

(*b*) *Isaac v. Humpage*, 1 Ves. J. 430. *Strathmore v. Bowes*, 1 Cox, 263. (*d*) *Peacock v. Peacock*, 16 Ves. 49. *Charlton v. Poulter*, 19 Ves. 148, in note.

(*c*) *Gibbs v. Cole*, 3 P. W. 255. See the case of *Isaac v. Humpage*, 3 Bro. C. C. 463, which case is condemned by Lord Eldon, in the subsequent (*e*) *Norway v. Rowe*, 19 Ves. 144.

(*f*) *Berkeley v. Brymer*, 9 Ves. 356. *Platt v. Button*, 19 Ves. 447.

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affidavits are filed prior to the answer, and the application for the injunction is made after the answer is come, affidavits subsequently filed, cannot be read in contradiction to it. (a) But when application is made for an injunction founded upon an affidavit, and the defendant applies that it may be set over, in order to file affidavits in opposition, and then instead of filing an affidavit, puts in an answer, the answer is considered as an affidavit, and the original affidavit may be read in opposition to it. (b)

at affidavits as to facts and circumstances, of which the defendants are ignorant, cannot be read in

writing or not. (a) And affidavits may be read on the part of the defendant, in opposition to plaintiff's affidavits in contradiction of the answer. (b)

Where the court grants or continues the injunction upon the merits, terms are often imposed upon the plaintiff; as that he should give judgment to the defendant, in the action which he has brought, and which the bill seeks to restrain, with a stay of execution; or that the plaintiff should pay into court the sum of money which is the object of the action: the latter condition is regularly imposed upon the plaintiff where the bill is filed after a verdict at law, and the injunction is obtained upon the defendant's answer, except in a case where the equity most clearly appears. (c) And if the injunction is obtained for want of an answer, and the defendant is abroad, the court will, upon the application of the defendant, before the answer, order the money recovered by the verdict, to be brought into court, or the injunction to be dissolved; but it seems that an affidavit is necessary to contradict the material allegations in the plaintiff's bill. (d) The court has also, under such circumstances, ordered the plaintiff to pay into court sums admitted by him to be due to the defendant, otherwise the injunction to be dis-

(a) *Jaggart v. Hewlett*, 1 Mer. 499.

(b) See observations of Lord Eldon, in 19 Ves. 54.

(c) *Wy. Pract. Reg.* 237.

(d) *Acton v. Market*, 2 Bro. C. C. 14. *Culley v. Hichling*, 182.

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d. (a) The money paid into court upon an injunction, and laid out, is considered as security, not payment ; therefore, if there is any stock remaining after payment of what is due to the defendant, it belongs to the plaintiff. (b) It is also to be observed, that the court on granting the injunction on the answer, will sometimes require the defendant that he should give security to abide the decree at the hearing, or the like ; and a clause is sometimes added to the order granting the injunction, that the plaintiff should speed his cause to a hearing. (c) The defendant is also sometimes required not only to give judgment, but likewise a release of errors, consenting to bring no writ of error. (d)

stances, the court will dispense with personal service on the party; as if the injunction be to restrain an action at law, and the plaintiff in that suit resides abroad. Here the court will substitute a service on his attorney or solicitor. And in the case of a special injunction, where the party absconded, the court has ordered that service at the house, which appeared to be the last place of abode of the party, should be good service. (a)

And there are cases in which the court will commit for breach of an injunction, although the act in violation of it be done before the writ is actually sealed; (b) as if the person against whom the injunction is applied for, is present in court at the time when the order for the injunction is pronounced; (c) or while the motion for the injunction is proceeding, although he quits the court just before the order is made; (d) or if he is served with a notice, that the order has been made, and does not deny, when the motion is made for his commitment, his belief that the order was made. (e) But if the person obtaining the order, lies by for a considerable time, as if it had

(a) *Pulteney v. Shelton*, 5 Ves. 147. *Pearce v. Crutchfield*, 14 Ves. 206.

(b) *Powell v. Follet*, 1 Dick. 116.

(c) *Ship v. Harwood*, 3 Atk. 564, and *Anon.* Ibid. 567.

(d) *Osborne v. Tennant*, 14 Ves. 136.

(e) *Kimpton v. Eve*, 2 Ves and B. 349. *Van Sandau v. Rose*, 2 Jac. and Walk. 264.

Injunction.

been granted, the court will not interpose to
in the defendant for a breach of the injunc-
although he were present in court when the
was pronounced. (a)

the party against whom the injunction is
ed, or his servants or agents [if they are
ioned in it], are guilty of a breach of it, after
e in any of the above-mentioned modes, the
on an affidavit of the act alleged to be a
h of the injunction, will commit the offender
e Fleet. (b) The notice of motion, which is
e be committed, not that he may show cause
he should not stand committed, must be

tion, may, by his acquiescence, dispense with the ordinary process for breach of it, although strictly, no act of his will amount to a waiver of the contempt incurred; (a) and in such a case, if the plaintiff applies to have the defendant committed, the court will not give costs on either side, and the plaintiff will take nothing by his motion. But peers, or members of the House of Commons, are not liable to be committed for a breach of an injunction, but the court will order a sequestration to issue. (b) And if an injunction has issued until answer and further order, and a sequestration has issued for breach of the injunction, the court will not discharge the sequestration on the ground, that before it issued, the defendant put in his answer. (c)

5th. The common injunction, *i. e.* the injunction which is granted upon a motion of course to stay proceedings at law, is to continue until the defendant has fully answered the plaintiff's bill, *and* the court make other order to the contrary. The defendant cannot, therefore, apply to dissolve

attachment. and not by motion for his commitment in the first instance. the old mode of proceeding in the cases of contempt, will be found in a preceding chapter; but that mode being excessively tedious, the court permitted the process to be shortened in the cases of con-

tempt not falling within the description of ordinary contempts by a commitment in the first instance.

(a) *Mills v. Cobby*, 1 Mer. 3.

(b) *Robinson v. Lord Byron*, 2 Dick. 703.

(c) *Ibid.*

Injunction.

injunction, until he has put in his answer. Sometimes happens, that if there are two or three defendants against whom an injunction is granted, the court will not dissolve the injunction until all have answered. (a) And in a case where an injunction to stay proceedings at law, in an action after verdict, the court dissolved the injunction as against some of the defendants who answered, but refused to dissolve it generally, leaving exceptions to the answer of the rest of the defendants. (b) So in an interpleading suit, one defendant cannot dissolve the injunction on his answer alone, another defendant not having answered. But if there is any delay in the plaintiff's

nisi, i. e. unless cause is shown to the contrary on a certain day specified in the order. And the defendant is not prevented from obtaining this order *nisi*, by his letting two terms pass after his answer was put in, without applying to discharge it ; and although the plaintiff had replied, served a *sub-pœna* to rejoin, and given a rule to produce witnesses. (a) If no cause is shown on the day appointed for that purpose, the injunction is dissolved of course, on producing an office copy of the affidavit filed, of the service of the order *nisi*. But if, after an order to dissolve an injunction *nisi*, a reference for impertinence is obtained, and the impertinence is expunged, and then exceptions are taken to the answer, which are disallowed, the injunction may be dissolved in the first instance, without an order *nisi*. (b)

The plaintiff, on the day for showing cause against dissolving the injunction, may either show cause on the merits confessed in the answer, or, having filed exceptions to the sufficiency of the answer, or procured a reference of it for impertinence, (c) he may show either of those circumstances as cause against dissolving the injunction ; as it may happen, that what the defendant calls

(a) *Molineux v. Luard*, 2 Dick. 684.

(c) *Fisher v. Bailey*, 12 Ves. 18.

(b) *Lacy v. Hornby*, 2 Ves. and B. 291.

Injunction.

answer, may be no answer at all, or a very imminent one. If the plaintiff shows cause on the merits, he must generally read in support of the injunction, passages out of the answer. It often happens, that when the day for showing cause comes, the plaintiff, intending to insist that there is sufficient ground from the facts admitted in the answer, to support the injunction, is not then allowed to go into the discussion; in this case, it is of course to allow the plaintiff time, upon his undertaking to show cause on the merits within a short period. But if the motion to dissolve the injunction absolutely, is made on the last seal of Trinity term, the plaintiff will not be permitted to have time till the next day of motions.

cure the Master's report upon the insufficiency in four days, upon the impertinence in a week, (a) or in default thereof, the injunction to stand dissolved, without further motion. The court allows exceptions to be shown for cause, even where no exceptions are actually on the file, upon the plaintiff's undertaking to file them immediately. (b) If the Master reports the answer insufficient, the injunction continues, as if no answer had been put in. The plaintiff cannot show exceptions for cause on the last seal after an issuable term, when the injunction stays trial. If the plaintiff fails to obtain the Master's report upon the exceptions within four days, the injunction is of course dissolved; but the plaintiff may afterwards obtain an order, to refer the exceptions to the defendant's answer, and upon such exceptions being allowed, the plaintiff may, as of course, obtain an order to revive the injunction. (c) But if the reference be for impertinence, the plaintiff cannot move immediately to revive the injunction, upon the answer being found impertinent. (d) If exceptions are shown for cause against dissolving the injunction absolutely, after an order *nisi* has been obtained, and if the Master reports the answer insufficient, the injunction is *ipso facto* gone, and no further

(a) *Goodinge v. Woodams*,
14 Ves. 534.

(c) *Philips v. Johnson*, 1
Dick. 292.

(b) *Vipan v. Mortlock*, 2
Mer. 479.

(d) *Dansey v. Browne*, 4
Mad. 237.

Injunction.

tion is necessary, (a) and an exception to the master's report will not uphold it. (b) So the exception to the report, before the order to dissolve the injunction *nisi* has been obtained, does prevent the defendant from obtaining such order. (c) But if, upon exceptions taken to the master's report, the court should be of opinion that the answer was not sufficient, the plaintiff may move to revive the injunction. (d) And it is still competent to the plaintiff to move to dissolve the injunction upon the merits admitted in the answer; but this must be done upon a regular notice given to the defendant. (e)

Then the court grants a special injunction

injunctions, granted before answer) may be dissolved, either upon the answer coming in, or upon an affidavit before answer. (a) Therefore, an injunction to stay proceedings at law, for want of an answer to an amended bill, obtained upon a *special* application, after a former injunction had been dissolved, may be discharged upon *affidavit*, before answer; (b) but if the application to dissolve that injunction is made upon the answer to the amended bill, exceptions to the answer may be shown for cause against dissolving the injunction. (c) But in general, where a *special* injunction has been obtained before answer, and an application is made to the court to dissolve it upon the answer, exceptions to it for insufficiency cannot be shown as cause against discharging the injunction, nor is it necessary to obtain an order *nisi*; but a motion is made upon notice to dissolve the injunction in the first instance. If the injunction to stay proceedings at law, is dissolved, by dismissing of the plaintiff's bill, either on the hearing, or for want of prosecution, the bail cannot file a new bill for an injunction, unless there is collusion between the principal and the plaintiff at law. (d)

(a) Taylor v. Waistall, before Lord Eldon, in the Sittings after Trin. T. 1813. v. Mortlock, 2 Mer. 476, in Trin. T. 21 June, 1817.

(c) Vipan v. Mortlock, 2

(b) Per Lord Eldon, in Vipan Mer. 476 and 477.

(d) Anon. 2 Ves. 630.

Injunction.

Where an injunction has issued irregularly, it may be discharged on motion; but any irregularity may be submitted to, and waived, by the party's affirming it by his own act; but the application by the defendant for time to answer, is not a waiver. (a)

An injunction may be put an end to, not only by an answer, where the plaintiff's equity is denied, but likewise by the allowance of a plea or a demurrer to the whole bill; but if the plea or demurrer be accompanied by an answer, as some equity may be shown from it for continuing the injunction, arising out of such answer, the defendant must then first obtain an order *nisi* before

suit is not revived, the defendant may then take out execution (a) So, where an injunction has been obtained in a cause, which afterwards abates by the death of the defendant, the practice is to move, on the part of the defendant's representatives, that the plaintiff may revive within a given time (a week generally), or the injunction be dissolved. (b) Where the court decrees a perpetual injunction, it is not necessary to revive upon every abatement; for this would be in effect to decree a perpetual suit. (c)

A *special* injunction does not necessarily, and of course, fall to the ground, on the plaintiff's amending his bill; (d) for the facts and circumstances on which the injunction was granted, may remain exactly as they were. And in a case, where an injunction was continued to the hearing, on the terms of the plaintiff's speeding the cause, and he afterwards filed an amended bill without leave, yet the court, although such practice was irregular, would not dissolve the injunction; as the amendment was material, and such as the court would have granted, if leave had been asked, and the plaintiff

(a) Gilb. For. Rom. 193.
Harr. Cha. Pract. 651. White
v. Hayward, 2 Ves. 46.

(b) Stuart v. Ancell, 1 Cox,
411. Hill v. Hoare, 2 Cox, 50.

(c) Askew v. Townsend, 2
Dick. 471.

(d) Mason v. Murray, 2 Dick.

536.

Injunction.

rewards offered to speed the cause. (a) And if plaintiff obtains an injunction of course till order and further order, and an answer is put in, which is reported insufficient, and the plaintiff obtains the usual order to amend his bill, and that defendant should answer the exceptions and amendments at the same time, the injunction still continues, notwithstanding the amendments; and defendant must answer both the exceptions and amendments, before he can apply to dissolve the injunction; and the motion to amend, without prejudice to the injunction, is of course. (b) But it seems that the words "without prejudice, &c." are unnecessary, as the amendment will not affect

being reported insufficient, before the plaintiff obtains the order to amend, the injunction stands or falls upon the original bill, and the answer thereto. (a) Where a *common* injunction has been obtained for want of an answer, the court will not permit the plaintiff, before the merits are discussed, to amend generally without prejudice to his injunction; (b) and notice of the motion must be given, and the proposed amendments must be stated. (c) But specified amendments will be permitted to be made upon a clear and positive affidavit by the plaintiff, that he did not know of the facts sooner. (d) But amendments will not be permitted, which seek to introduce a new case against the defendant; (e) and if exceptions are taken to the answer, it would be clearly irregular to move for the common order to amend, till the exceptions are disposed of. (f) But after an injunction has been granted, or continued upon a discussion of the merits, a motion to permit the plaintiff to amend generally, without prejudice to his injunction, is a motion of course. (g)

(a) *Mayne v. Hochin*, 1 Dick. 255.

(b) *Turner v. Bazely*, 2 Ves. and B. 330; *Home v. Watson*, 2 Sim. 85.

(c) *Pratt v. Archer*, 1 Sim. and Stu. 433.

(d) *Sharp v. Aston*, 3 Ves. and B. 144.

(e) *Penfold v. Stoveld*, before the V. C. Sir J. Leach, 17th Dec. 1818, 3 Mad. 471.

(f) *Dixon v. Redmond*, 2 Sch. and Lef. 515.

(g) *King v. Turner*, before the V. C. Sir J. Leach, 16th April, 1822, 6 Mad. 255; *Pratt v. Archer*, 1 Sim. and Stu. 433.

SECTION VIII.

Writ of Ne Exeat Regno.

Although this writ is usually applied for on the bill, yet it may not, perhaps, be thought proper, to make it the subject of a section in this chapter, as it may be introduced here with violence to the arrangement of this treatise, or in any other part. This writ, though originally applicable to purposes of state,^(a) as a prerogative writ, now is extended to private

forced; (a) and the writ cannot be obtained upon an affidavit sworn before the bill was filed. (b) This writ has been granted after the Master's report, although the bill did not pray the writ. (c)

The application for this writ ought to be made promptly. (d) It issues only on an equitable demand, with the exception of a decree for alimony, and in account; in the former, it issues for the arrears, but for those only, and costs. (e) It has been refused upon a demand at law, not merely because the plaintiff may have bail, and he ought not to have double bail, both at law and equity, (f) but for want of jurisdiction in such a case; the court having refused to grant this writ upon a legal demand, against an attorney, although he could not be held to bail. (g) But it may issue upon a debt founded upon a balance of account; as account is matter of equitable, as well as legal, cognizance, although bail might be had for the

(a) *Goodman v. Sayers*, 5 Mad. 471. *Sed vide* *Stewart v. Stewart*, 1 Ball and Beat: 73.

(b) *Anon.* 6 Mad. 276.

(c) *Collinson v. ———*, 18 Ves. 353.

(d) *Jackson v. Petrie*, 10 Ves. 166. *Dick v. Swinton*, 1 Ves. and B. 371.

(e) *Anonymous*, 2 Atk. 210.

Shaftoe v. Shaftoe, 7 Ves. 171.

Dawson v. Dawson, *ibid.* 173.

Oldham v. Oldham, *ibid.* 416.

Haffey v. Haffey, 14 Ves. 261.

(f) *Ex-parte Brunker*, 3 P. W. 312, 314. *Loyd v. Cardy*, *Pre. Cha.* 171.

(g) *Ex-parte Mountfort*, 15 Ves. 445.

Writ of Ne Exeat Regno.

t. (a) If, however, the plaintiff has actually paid the defendant to bail, the court will not grant the writ; or, if granted, will discharge it. (b) The plaintiff's hand must likewise be clear, (c) and a money judgment, (d) a debt actually due, (e) a future, or contingent one, will not be sufficient. (f) And where an application for the writ is founded upon a transaction in a foreign country, and which has been fully satisfied there, as no equity can arise here, from a transaction so satisfied, the writ will not be granted. (g) And if the debt, on which the writ is applied for, arises out of partnership transactions, as due from one partner to another, it is necessary that the partnership should have been

tion of the vendor, marked with the full amount of the purchase money, notwithstanding it was subject to an abatement. (a) But it was doubtful, upon the authorities cited below, whether the court would grant a *ne exeat* upon an agreement, before it had been shown that the plaintiff (the vendor) is entitled to a specific performance. (b) Neither will this writ be granted where a necessary party is not before the court ; (c) or where the party is out of the jurisdiction of the court. (d) But in a very late case, where a bill had been filed for specific performance by the vendor, Lord Eldon decided, that a writ of *ne exeat regno* ought not to issue against the purchaser, unless the court can make it out to be quite clear, that there must be a specific performance. (e)

This writ may be obtained without notice, even though the defendant has appeared ; (f) it must be supported by affidavit of the existence, and the amount, of the debt, and that the defendant is going abroad. It must be as positive to the

(a) Boehm v. Wood, 1 Turn. 332.

(b) Goodwyn v. Clark, 2 Dick. 497. Sugd. on Vend. and Purch. 184. Beam. ne exeat, 75. Raynes v. Wyse, 2 Mer. 472.

(c) Ray v. Fenwich, 3 Bro. C. C. 25.

(d) Leigh v. Norbury, 13 Ves. 342.

(e) Morris v. M^cNeil, 2 Russell, 604.

(f) Elliot v. Sinclair, 1 Jac. 545.

Writ of Ne Exeat Regno.

itable debt, as an affidavit of a legal debt to
d to bail. (a) An affidavit, stating merely
ormation and belief as to the amount of the
t, will not do, (b) except where it is a matter
oure account, (c) as in the case of partners, and
utors, and assignees of a bankrupt, (d) where
ormation and belief will be sufficient. The
rt of Exchequer granted an order, in the
ure of this writ, against an accountant of the
wn, sworn to be about to leave the kingdom,
hout having rendered his accounts, although
precise sum was sworn to be due from the
endant. (e) Where the bill is against an
inistrator, it is necessary that the plaintiff

been applied, for upon admissions in the answer, but that the admissions would certainly do, as well as an affidavit. (a) And if the person with whom the debt was contracted, has become a lunatic, the oath of his committee will be sufficient, not swearing to a debt, but merely stating that a note for 300*l.* was given in 1810, as the balance of account. (b) But if the mode of computing the account be mentioned by the plaintiff, and it appears to comprise unascertained sums, or to cover sums in the nature of damages, the writ should not be granted for those sums. (c) And to this it should be added, that Lord Chancellor Eldon, in *Amsinck v. Barklay*, (d) observes that the practice, that stating belief of the balance of an account is sufficient, is as old as Lord Hardwicke's time; but in future, he should pause upon that, unless facts and declarations, as the ground of his belief, are stated.

The fact of the defendant's intending to go abroad, must be ascertained also by an affidavit, either swearing positively that the defendant is going abroad, or stating some declaration by him, or other circumstances, proving that intention. (e)

(a) *Roddam v. Hetherington*,
5 Ves. 91.

(d) 8 Ves. 594 and 597.

(b) *Stewart v. Graham*, 19
Ves. 316.

(e) *Etches v. Lance*, 7 Ves.
417; *Russell v. Ashby*, 5 Ves.
96; *Kannay v. M'Entire*, 11

(c) *Flack v. Holme*, 1 Jac.
and Walk. 405. Ves. 54, contra.

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rely swearing to information is not, generally, sufficient. (a) But it is not necessary that this affidavit should be made by the plaintiff; and an affidavit made by another person, to belief of defendant's intention to quit the kingdom, upon information received from two persons of his family, that they were about to go to the Isle of Man, is sufficient. (b) But it seems that the person from whom the information was received, should not be the wife of the defendant. (c)

It is not requisite that it should appear that the defendant's motive for going abroad, is to avoid process of the court; (d) for a defendant has

occasions or misfortunes have brought them here, (a) where the parties lived, at the time the debt was contracted, in a foreign country, which does not allow of arrest in such cases. (b) It is true that it has been granted in such an instance; but it was afterwards discharged by the Lord Chancellor, because he thought no debt was due; but intimating, at the same time, that it was delicate to interfere at all in such a case. (c)

It is proper here to state, that Lord Hardwicke, in *Robertson v. Wilkie*, (d) was not inclined to grant this writ, where one of the parties corresponding, or dealing, lives out of the kingdom, and the transactions were on the faith of having justice in the places where the parties respectively lived. But Lord Thurlow, in *Atkinson v. Leonard*, (e) appears rather to dissent from Lord Hardwicke's reasoning in the above case. But the circumstance of the defendant being a foreigner, and residing abroad, where the debt was contracted, and in a country, by the laws of which he would not be arrested for a debt of that nature, is not a ground for refusing the writ,

(a) *De Carriere v. De Calonne*, 4 Ves. 591. See *Atkinson v. Leonard*, 3 Bro. C. C. 218. *Whitehead v. Murat*, Bunb. 183.

(b) *Flack v. Holme*, 1 Jac. and Walk. 417.

(c) *De Carriere v. De Calonne*, 4 Ves. 577, 591.

(d) *Ambl.* 177.

(e) 3 Bro. C. C. 218.

ere the plaintiff is an Englishman, and resident
e. (a) And it seems to be established gene-
y by several decisions, that the court will grant
s writ, although the defendant be a foreigner,
d although the defendant's general residence be
he West Indies, Scotland, or Ireland. (b) And
s no valid objection to the issuing of this writ,
t the defendant is about to leave this country,
the captain of an East India ship, in the usual
it of his life. (c)

The court will not grant this writ, to restrain
member of parliament, representing an Irish
ough, from going to Ireland, though Ireland is
reign country in the sense of the language of

It is no objection that the affidavit on which the application was made, is sworn in Ireland before a master. (a) However, Lord Chancellor Eldon, in a late case, seems to consider that the writ issued improperly, when it issued upon an affidavit sworn before a justice of the peace in Scotland. (b) And the court will not grant this writ, upon the affidavit of the wife against the husband. (c) On application for this writ, no *subpœna* is served, but on personal service of the writ, the party is bound to appear, and put in his answer; then he may apply to supersede the writ, but not before. This writ may be discharged by the defendant, on his satisfying the court by his answer, or affidavit, that he has no intention of leaving the kingdom. (d) But with regard to the debt, it is clear, says Lord Chancellor Eldon, in *Jones v. Alephsin*, (e) that against a positive affidavit, the defendant's oath, or the plaintiff's admission, will not prevail. Upon this point, however, it is proper to call the attention of the reader to an observation of Lord Rosslyn, in *De Carriere v. De Calonne*. (f) His Lordship says, that if it is a simple, clear, definite demand in equity, there is seldom much

(a) *Johnson v. Smith*, 2 Dick. 592.

(b) *Hyde v. Whitfield*, 19 Ves. 342.

(c) *Sedwick v. Walkins*, 1 Ves. J. 49.

(d) *Bernal v. Marquis of Donegal*, 11 Ves. 46. *Amsinck*

v. Barklay, 8 Ves. 594.

(e) 16 Ves. 470.

(f) 4 Ves. 591.

Writ of Ne Exeat Regno.

portunity given for explanation of the case, in the part of the defendant; but if it be commented, if, from the statement of the circumstances, the general result is, that an equity exists, the obvious justice is, that the other party should have an opportunity of stating the circumstances, that they may be so combined, as to produce an equity, although it does not obviously arise. Under these circumstances, the answer may be read in opposition to the affidavit, on which the writ was obtained. (a) And generally, the court is disposed to discharge the writ, upon the defendant giving security to abide the event of the suit. (b) If this writ is obtained wrongfully, the court will discharge it with

for the same matter, for which the writ of *ne exeat regno* issued, the defendant being in contempt and in custody for not performing the decree, the sureties obtained their discharge. (a) The court will discharge the recognizance of the defendant and sureties, on payment of the sum for which it was taken: although it appears, on the Master's report, that a larger sum is due from defendant to the plaintiff. (b) The court will not give leave to amend a bill without prejudice to the writ of *ne exeat* which had issued in the cause. (c)

This writ is commonly directed to the sheriff, to make the party find sufficient security, that he will not depart the realm without the order of the court; and on his refusal so to do, the sheriff to commit; and the writ is marked at the back in what sum this bond shall be taken, and, generally, the penalty is double the sum. Where the writ issues against an executor, at the instance of a legatee, it must be marked for the whole amount of what is due, not only to the plaintiff, but to other persons. (d) And where a writ of *ne exeat regno* issues for a larger sum than is due, the court

(a) *Debazin v. Debazin*, 1 (c) *Grant v. Grant*, 2 Sim.
1 Dick. 95. 14.

(b) *Baker v. Jefferies*, 2 Cox, (d) *Fanneil v. Taylor*, 1 Turn.
226. *Evans v. Evans*, 1 Ves. 100.
J. 96.

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make an order, that so much only shall be
ed as is due, without quashing the writ. (a)

It is said in the books, (b) that a person taken by
sheriff on a *ne exeat regno*, must enter into
three different bail bonds, before he can get at
erty, viz., in one to the sheriff, in one to the
ster of the Rolls, and in a third to a Master
Chancery. But the sheriff is not compellable
take securities; and Lord Chancellor Eldon
ought the sheriff not censurable, where he had
only refused to take securities, but obtained
amount of the sum indorsed on the writ,
ore he would suffer the defendant to go at

who had agreed to be answerable for him, to pay into court the sum, for which the writ was marked, or that, in default, proceedings should be had on the bond.

If the defendant, after having entered into the usual recognizance, is desirous of leaving the kingdom, and would guard against the inconvenience of having the bond put in force against him, or his securities, the course is to apply by motion to the court, for permission to quit the kingdom, when the court, on hearing both sides, will make such order as, under the circumstances, will be just. (a)

This writ was granted by Lord Macclesfield and Lord Hardwicke, against a *feme covert* executrix, whose husband was out of the jurisdiction, although she herself could not give the security. (b) And writs of *ne exeat* have been granted against the husband and his wife (executrix), the plaintiff undertaking not to serve more than one of the writs. (c) But in the very late case of *Pannell v. Taylor*, (d) before Lord Eldon, although his Lordship, under similar cir-

(a) Per Lord Eldon, in *Musgrave v. Midex*, Beam. *ne exeat*, 97. 97, in the note; *Jerningham v. Glass*, 3 Atk. 409.

(c) *Moore v. Hudson*, 6 Mad.

(b) *Moore v. Meynel*, 1 Dick. 218.

30; *Jernegan v. Glass*, 1 Turn. (d) 1 Turn. 96.

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instances, upon the authority of the cases of
ore v. Meynel, and Jernegan v. Glasse, granted
writ, yet his Lordship afterwards discharged
observing that no instance had been produced
such a writ having been granted, since the
r 1746, and that the general rule was, that in
equitable case, you cannot hold a party to an
itable bail, where, in a legal case, you could
compel him to give effectual legal bail.

Under this process, it has been held an abuse
t, to break open the doors, and take the party
ed. (a)

CHAPTER VI.

DISMISSION OF BILL BY DEFENDANT ON INTERLO-
CUTORY APPLICATION, AFTER DEFENCE PUT IN.

*Dismission of Bill by Defendant for want of Prosecution;
Putting Plaintiff to his Election.*

SECTION I.

*Dismission of Bill by Defendant for want of
Prosecution.*

HAVING stated some of the most usual applications, which are made to the court by the plaintiff, in the present stage of the cause, it will be proper to call the attention of the reader to those which are frequently made by the *defendant* against the plaintiff, and by which the bill may be dismissed without bringing the cause to a hearing.

By the practice of the court, before the orders of 1828, if the plaintiff suffered three terms to

Dismissal of Bill,

se after answer, exclusive of the term in which the answer was filed, without taking any in the cause, the defendant might, upon certificate thereof, by the six clerk, without notice, in an order that the plaintiff's bill should be dismissed, with costs. (a) But, by the 16th of the General Orders of 3rd April, 1828, where the answer of a defendant is deemed to be sufficient, whether it be in term time or in vacation, if the plaintiff, or plaintiffs, shall not proceed in the cause, the defendant shall be at liberty to move, the first seal after the following term, upon notice, that the bill be dismissed, with costs, for want of prosecution; and the bill shall accordingly be

gence has been used to obtain a sufficient answer, or answers, from such other defendant or defendants; in which case the court shall allow to the plaintiff or plaintiffs such further time for proceeding in the cause as shall appear to the court to be reasonable.

But a bill cannot be dismissed by an order of course, made at the Rolls, upon petition. (a) And if there have been motions made in the cause, the court will preface the decree of dismissal, with a direction that those costs should be paid. (b) The old practice required that the six clerk's certificate should be produced at the time the order was applied for (c); but, by the present practice, it is sufficient if the certificate is produced to the register before the order is drawn up, although not obtained, when the order was made; (d) but the certificate ought not to state any subsequent proceedings; (e) and it would be irregular for the plaintiff to file his replication after the order of dismissal had been obtained, although, at the time it was filed, the order had not

(a) *Van Sandau v. Moore*, 1 Russell, 441 and 468.

(b) *Wild v. Hobson*, 4 Mad. 49.

(c) *Wells v. Pugh*, 10 Ves. 403.

(d) *M'Mahon v. Sisson*, 12 Ves. 465. *Browne v. Byne*,

1 Ves. and B. 310.

(e) *King v. Noel*, 5 Mad. 13.

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drawn up, owing to the defendant's clerk in not procuring the six clerk's certificate. (a)

But it is proper to observe, that, under special circumstances, supported by affidavit, and on notice, the court would, before the late orders, have discharged the order of dismissal, and permitted the plaintiff to amend his bill, upon payment of costs. (b) But the court would not restore a bill, which has been regularly dismissed, for the mere purpose of agitating the question of costs. (c) But the bill has been restored, though the order to dismiss was not obtained till after a considerable interval since the last proceeding in the cause; and though the plaintiff acquiesced in the order, the

impertinence, which is not prosecuted; (a) and by a defendant, though he has become a bankrupt since the commencement of the suit; (b) and, until the late orders, by one defendant, although the others stand out the process of contempt; and it would be of no use to bring the cause to a hearing against the former alone. (c) But, after a general demurrer, (d) or after a plea, although accompanied with an answer, (e) but not set down to be argued, the defendant cannot dismiss for want of prosecution, for he has equal power to set them down to be argued; nor where, in a bill for the specific performance of an agreement, there is depending a reference to the Master to inquire into the title; (f) nor where an injunction had been obtained, restraining the defendant from proceeding in an action at law, on the plaintiff undertaking to give judgment to be dealt with as the court should direct, and not to bring any writ of error. (g) Neither can a defendant

and B. 170. *Hannam v. South London Water Works Company*, 2 Mer. 61. *James v. Bion*, 3 Swanst. 244.

(a) *Railton v. Woolrick*, 3 Swanst. 247.

(b) *Rhode v. Spear*, 4 Mad. 51.

(c) *Anonymous*, 9 Ves. 512. *Harr. Cha. Pract.* 1808. P.

316. *Gilb. For. Rom.* 111. *Contra Anon.* 2 Atk. 604.

(d) *Anonymous*, 2 Ves. J. 287. *Simpson v. Densham*, 2 Cox, 377.

(e) *Anon. Barnard*, 287.

(f) *Biscoe v. Brett*, 2 Ves. and B. 377.

(g) *James v. Bion*, 3 Swanst. 234.

Dismissal of Bill,

ve to dismiss a bill for a discovery merely, but
pray for an order only, that the plaintiff
ould pay the defendant the costs of the suit to
taxed.(a) But a bill to perpetuate testimony,
y be dismissed, for want of prosecution, any
e before replication and examination of wit-
ses.(b)

f a sole plaintiff become a bankrupt, the proper
rse is to obtain an order, not to dismiss the
for want of prosecution, but that the assignees
made parties, within a limited time, or the bill
dismissed; but it seems that the court will
dismiss it with costs.(c) But if there be two

could not file his answer to the bill, as the suit had abated by the death of one of the plaintiffs; nor could he move to dismiss for want of prosecution, because the answer was not filed.(a)

The plaintiff, to prevent the order to dismiss from being obtained, ought to file his replication, or obtain an order to amend his bill before the motion to dismiss is made; either of these steps will (subject to the restrictions after mentioned) prevent the suit from being dismissed for want of prosecution; and an order to amend will have that effect, although obtained by petition at the Rolls, the day after notice of a motion to dismiss on the following seal, but before such motion was actually made.(b) So the filing of a replication, on the same day on which the motion was made, prevents the dismissal; and it is immaterial whether it was filed before or after the motion to dismiss, because there can be no fraction of a day.(c) But if the replication is not filed till some days after the order of dismissal is pronounced, although before the service of it, the replication then does not prevent the effect of the order; for it operates from the day of being pro-

(a) *Adamson v. Hall*, 1 Turn. 258.

(b) *White v. Hall*, 14 Ves. 208.

(c) *Reynolds v. Nelson*, 5 Mad. 60. *Spurrier v. Bennett*,

4 Mad. 39.

Dismissal of Bill,

need. (a) An order to refer an answer for imminence is regular, which is obtained on the for which the notice to dismiss is given. (b)

he defendant could not, before the orders of 3, again apply for a dismissal, until three months had elapsed after the filing of his answer to amendments; but if the plaintiff, after obtaining this order to amend, delays amending his after a reasonable time allowed for that purpose, the defendant might obtain an order to discharge the former order to amend, and that the should be dismissed, unless the plaintiff will undertake to amend his bill within a limited time,

the bill can be dismissed.(a) And it seems, that the actual amendment of the bill was not, of itself, such a proceeding as would retain a bill in court, unless a *subpœna* was issued.(b) But the order to amend having been served, the defendant could not dismiss the bill, for want of prosecution, without first moving that the amendment should be made within a limited time, or the order to be discharged.(c) However, if the order to dismiss is not served till eight months after it has been obtained, and between the order and service of it the plaintiff obtains an order to amend, the court will not discharge the latter order.(d) By the 14th order of the General Orders of 1828, every order for leave to amend the bill shall contain an undertaking by the plaintiff to amend the bill within three weeks from the date of the order; and, in default thereof, such order shall become void, and the cause shall, as far as relates to any motion to dismiss the bill for want of prosecution, stand in the same situation, as if such order had not been made.

Showing cause against dissolving the injunction is not such a proceeding in a cause as to prevent

(a) *Morris v. Owen*, 1 Ves. and B. 523; *Tanner v. Dean*, 4 Mad. 176.

(c) *Kendall v. Beckett*, 1 Russell. 152.

(d) *Young v. Smith*, 3 Mad.

(b) *Cooke v. Davies*, 1 Russell, 153, in note. 196.

Dismissal of Bill,

Bill from being dismissed for want of prosecution. (a)

But it may be proper to add, that if a false representation, by the plaintiff's clerk in court, to the defendant, leads the latter to obtain the order of dismissal irregularly, the court will not discharge the order, unless the plaintiff will pay the costs of charging it. (b)

By the practice of the court before the Orders of 1828, if the plaintiff filed a replication, (and which he might do, notwithstanding an order to dismiss, where, in the title of it, the plaintiff is

certificate, and upon notice. (a) The plaintiff must, if he meant to proceed in the suit, have undertaken, by his counsel, to speed the cause, which was the only answer to that application: special circumstances might be made the ground of a special application. (b) Unless the plaintiff entered into the above undertaking, the bill would be dismissed in the first instance; but a motion paper signed by counsel undertaking to speed the cause, left at the Register's Office on the same day the motion was made, was sufficient; and if an order to dismiss is drawn up, with notice of the undertaking, the order would be discharged with costs. (c) After this undertaking to speed his cause, the plaintiff was not allowed to withdraw his replication, and amend, except under particular circumstances. (d) But the court would give him leave to withdraw his replication, and to set down his cause upon bill and answer; in which case, if the plaintiff did not appear at the hearing, the bill would be dismissed with costs, although a *subpœna* to hear judgment had not been served on the defendant. (e)

(a) Harr. Cha. Pract. 1808, p. 314; Lyon v. Dumbell, 11 Ves. 608.

(b) Bligh v. ———, 13 Ves. 455.

(c) Lyndon v. Lyndon, 3 Mad. 240.

(d) Pitt v. Watts, 16 Ves. 126; Dean and Chapter of Christ Church v. Symonds, 2 Mer. 467; Ryan v. Stewart, 1 Cox, 397.

(e) Rogers v. Goore, 17 Ves. 130.

Dismissal of Bill,

If the plaintiff, after having entered into this undertaking, neglects to proceed for a term, (a) next term, if it, the defendant may upon motion, with notice and production of the former order, together with the clerk's certificate, obtain a peremptory order for the dismissal of the bill with costs, *unless* the plaintiff appeared, and undertook to give rules to examine witnesses, and to pass publication in the first term of the ensuing term, and to set down the cause for hearing in the term after. (b) It is, of course, that a plaintiff, even after this peremptory order to speed his cause, shall have an order for a commission to examine witnesses, and a liberty to examine them in term time. (c)

The reader will have observed, that now, by the 17th of the General Orders of 1828, on a motion to dismiss for not proceeding after answer, the bill would be dismissed unless the plaintiff *forthwith* filed a replication, and appeared on such motion, and gave an undertaking to speed the cause with effect in the usual way.

But the defendant could not, by the old practice, move to dismiss a bill after publication had completely passed, but the cause must be set down *ad requisitionem defendantis*; (a) but it is stated by Lord Hardwicke, that after a *subpœna* to rejoin, and after a commission for examination of witnesses, the defendant might move to dismiss. (b) But in *Tozer v. Tozer*, (c) Lord Thurlow was of opinion, that after a rejoinder, the defendant could not move to dismiss, for want of prosecution; for the reason of allowing the defendant to dismiss the bill for want of prosecution before issue joined, was, because till then, the defendant could not proceed himself, but as soon as issue is joined, he may. But where a cause coming on to be heard, stands over

(a) *Skip v. Warner*, 3 Atk. 558. *Squirrel v. Squirrel*, 3 Swanst. 256, in note. *Fell v. Morris*, 1

(b) *Skip v. Warner*, 3 Atk. 558; *Harr. Cha. Pract.* 1808, Cox, 176.

(c) 1 Cox, 283. p. 314; *Gilb. For. Rom.* 114.

Dismissal of Bill, &c.

liberty to the plaintiff to amend, and the plaintiff accordingly amends, but proceeds no further, the defendant may move to dismiss the bill for want of prosecution, and it is not necessary to set it down again for this purpose. (a)

To expedite the hearing of a cause, an alteration has been since made in the practice of the court; for by the 17th of the General Orders of 1766, where the plaintiff files a replication without having been served with a notice of any kind, the court may move to dismiss the bill for want of prosecution. The plaintiff shall serve the *subpoena* to the witnesses, and obtain his order for a commission

following term, there the plaintiff shall give his rules to produce witnesses, and pass publication in the next term, and shall set down his cause to be heard in the third term; and if the plaintiff shall make any default herein, then upon application by the defendant, upon *motion* or *petition* without notice, the plaintiff's bill shall stand dismissed out of court with costs.

Notwithstanding a bill has been dismissed for want of prosecution, the court has jurisdiction upon motion made in that suit, to order money which has been paid into court in that suit, to be paid to the party entitled to it. (a)

SECTION II.

Putting Plaintiff to his Election.

If the plaintiff is proceeding against the defendant, both at law and equity, at the same time, and for the same thing, the defendant having first answered the bill, may obtain an order (b)

(a) *Wright v. Mitchel*, 18 Ves. 293. might have pleaded the pendency of the suit at law, in bar

(b) By the ancient practice of the Court, the defendant of the suit in equity. *Beam. Cha. Ord.* 177.

Putting Plaintiff to his Election.

t notice, (a) by which the plaintiff is directed to elect within eight days after notice of the order, to which court he would proceed; and if he elects to proceed in this court, the proceedings at law are by that order stayed; but if the plaintiff shall elect to proceed at law, or in any other court, his bill is to be dismissed with costs. (b) The plaintiff may also be put to his election, whether he is proceeding in this court, and in a foreign court. (c) This order is to be served on his clerk or attorney, and, according to the words of the order, if he elects to proceed here, an injunction issues in equity; if at law, his bill stands dismissed.

for the same matter. (a) Indeed, it seems, from what fell from Lord Eldon, in *Carwick v. Young*, (b) that it is the general rule, that the plaintiff is not at liberty after an order for election, to proceed, either at law or in equity; but the court, in the particular circumstances of each case, will give liberty to proceed, as those circumstances require. And his Lordship, in the case of *Amory v. Broderick*, (c) states his opinion to be, that an injunction to stay proceedings during the reference, ought to be inserted, as a matter of course. But where, the plaintiff having before the order was drawn up proceeded at law, the defendant had applied to the court of law, and obtained time upon terms, it was held that he, the defendant, had waived the benefit of the order, and was bound by the intermediate proceedings. (d) If the defendant pleads to the bill, although he accompanies his plea with an answer, he is not entitled to put the plaintiff to elect, because for this purpose the plea is not an answer, and he must first answer before he is entitled to the order. (e) So, if an answer is put in, to which

(a) *Heathcote v. Hulne*, 1 Jac. and Walk. 129.

(b) 2 Swanst. 243.

(c) *Jacob*, 530 and 532.

(d) *Amory v. Broderick*, Jac. 530.

(e) *Fisher v. Mee*, 3 Mer. 45; *Vaughan v. Welsh, Moseley*, 210.

Putting Plaintiff to his Election.

ions are taken, the plaintiff cannot be put
election till they are answered. (a)

after the expiration of the eight days from
ervice of the order to elect, the plaintiff
, on a motion of course, move for leave
exceptions *nunc pro tunc*; but ought to
a special application for that purpose, and
order to suspend the election, until the
ions are answered. (b)

efendant cannot by motion obtain an order
ference to a Master, to see whether two
in *this* court are brought for the same

The order for an election prevents the plaintiff only from proceeding in both courts at the same time; the plaintiff, therefore, may, if he fails at law, bring a new bill for the same matter. (a) And if the plaintiff's bill is dismissed at the hearing, he is at liberty to proceed at law; for the injunction, for stay of proceedings at law, is gone by dismissal. (b) But, in order to prevent this, the defendant ought to file a cross bill for a perpetual injunction at law; and then, though the plaintiff's original bill be dismissed, yet the defendant may have a decree against him upon his cross bill. (c)

Under particular circumstances, the plaintiff will be permitted, instead of making a general election, to make a special election, to proceed for part here, and part at law; (d) in which case, with regard to what the plaintiff in equity elects to proceed in at law, his bill will be dismissed, with costs. (e)

If the order putting the plaintiff, suing here and at law, to his election, is supposed to have been obtained upon false suggestion, the matters being

(a) *Plymouth v. Bladon*, 2 Vern. 32.

(b) *Gilb. For. Rom.* 201.

(c) *Ibid.* 201 and 222.

(d) *Joyce v. Barker*, 1 Dick. 182; see *Baker v. Dumaresque*,

1 Atk. 119.

(e) *Anon.* 3. P. W. 90.

Putting Plaintiff to his Election.

at, the proper mode is to move to dis-
that order; and if, upon that application,
ly appears, that the suits are not for the
matter, the court will not refer it to the
, but at once discharge the order; (a) but
ourt has any difficulty in determining, whe-
ey are for the same matter or not, then a
ce is directed to the Master to ascertain
nt.(b)

ter a decree to account, the plaintiff sues
endant at law, the defendant is not under
essity of moving the court that the plain-
be put to his election, but, at once, may

CHAPTER VII.

PROCEEDINGS PREPARATORY TO, AND THE MODE OF,
EXAMINING WITNESSES.

Replication and Rejoinder: Commission to Examine Witnesses: Examination of them: Publication of their Testimony.

SECTION I.

Replication and Rejoinder.

IF the answer is sufficient, and simply admits the case stated in the plaintiff's bill to be true, or enough of it to entitle the plaintiff to a decree, without introducing any new material matter, in bar of the plaintiff's equity, the plaintiff may set down the cause to be heard on bill and answer, without replying to the latter; in which case the answer is taken to be true.^(a) But if the plaintiff be an infant, his not replying will not relieve the defendant from the necessity of proving the facts

(a) Note. By the 64th of Cha. Orders, 29, if a hearing Lord Bacon's Orders, Beam. be prayed upon bill and an-

Replication and Rejoinder.

in the answer. (a) Lord Eldon, in the case *Edell v. Tatlock*, (b) observes, that it had been argued that, in the case of an infant plaintiff, the answer must be a replication; but he could not find it laid down in any book of practice.

If the defendant denies, or does not admit the truth of the plaintiff's case; or, admitting it, introduces new facts; which, if true, would prevent the plaintiff from succeeding, he must then make a replication to the defendant's answer, and merely insists, generally, that the allegations in the bill are true, and denies those in the answer to be so; and the defendant is then put to

nerally; that is, if he denies, by his answer, that he claims any right or interest in any of the matters in dispute; or demurs, or pleads, to the whole bill, [in the latter case, the plaintiff, not disputing the fact contained in the plea,] the plaintiff is not to reply; if he does, and serves the defendant with a *subpœna* to rejoin, the defendant may have costs for this vexation; (a) but otherwise, where the disclaimer is to part, and the answer is as to the other part. (b)

Formerly, if the defendant, by his plea or answer, offered new matter, the plaintiff replied specially, which was frequently attended with great prolixity of pleading; and, consequently, with considerable expense and delay; for which reasons special replications are now very properly laid aside; and the plaintiff, if he thinks, from the new matter introduced by the answer, the frame of his bill is not properly adapted to his case, amends his bill, and renders it so. Where there is a supplemental bill, and it merely introduces supplemental matter, to sustain the relief sought by the plaintiff, from the same defendant, by the original bill, it is not a supplemental suit; and there

(a) Harr. Cha. Pract. 1808. (b) Williams v. Longfellow, p. 238. Wy. Pract. Reg. 374. 3 Atk. 581.
Williams v. Longfellow, 3 Atk. 581.

Replication and Rejoinder.

only one record and one cause to be set down;
, therefore, only one replication is necessary.(a)

We have before seen in what cases, (b) by the
n of the General Orders of 1828, the plaintiff's
is liable to be dismissed for want of prosecution,
e does not file his replication. But if it is not
nished, the plaintiff may still file his replication;
he has been allowed to do this, even after he has
ught his cause to a hearing on bill and answer;
though it appeared that the bill ought to be
nished for want of sufficient matter, confessed
he answer, on payment of the costs of the day,
in four days after the hearing, otherwise the

after a decree, give leave to plaintiff to file replication *nunc pro tunc*.(a)

The replication, of which we have been speaking, need not be signed by counsel. It is engrossed on parchment, and marked near the top with the time when filed, and subscribed near the bottom, on the left side, with the surname of the clerk in court who filed it; and also the term when the bill was filed, with the surname of the defendant's six clerk. The clerk in court then enters it in his cause book, and files it with his six clerk, giving notice to the defendant's clerk in court of what he has done. But the plaintiff is at liberty, if he has not undertaken to speed his cause, to withdraw his replication, upon twenty shillings costs, as of course. (b) He cannot do this after witnesses are examined.(c)

The next step after replication is a rejoinder, by which the defendant traverses the plaintiff's replication, and asserts the truth and sufficiency of his own answer. However, now a rejoinder is never actually filed. But the plaintiff obtains, of course, an order for a *subpœna*, returnable immediately against the defendant, requiring him to appear to

(a) *Rodney v. Hare*, Mos. v. Phipps, 3 Ves. and B. 19; 296. Pott. v. Reynolds, 3 Atk. 566.

(b) *Lord and Lady Perceval* (c) *Gordon v. Gordon*, 3 Swanst. 420.

Replication and Rejoinder.

unless he will appear *gratis*; and it is part
order, that service of the *subpæna*, on the
clerk in court, should be deemed good

But, by the 20th order of the General
of 1828, service on the clerk in court of
pæna to rejoin, &c., shall be deemed good

plaintiff, in a bill of interpleader, is bound
to prosecute the suit, so far as to sue out a *subpæna*,
in order that the defendants may ex-
amine witnesses.(a) But if the plaintiff in such a
bill is against two persons, one within, and the other
without the jurisdiction of the court, cannot, within

and a trial at law has been directed, to settle the right between the defendants, this puts an end to the suit, as to the plaintiff; so that, if he afterwards dies, the cause shall still proceed, and there needs no revivor, each defendant being in the nature of a plaintiff. (a)

The object of the *subpæna* to rejoin is merely to put the cause completely in issue between the parties. For, immediately after the return of this process, and service on the defendant, or his clerk in court, or after the defendant has appeared to rejoin, *gratis*, the parties may proceed to examine their witnesses.

But, in a suit to perpetuate testimony, the plaintiff was permitted to examine his witnesses, although no answer was come in, the defendant having stood out all process of contempt, whereby the plaintiff was prevented from suing out a *subpæna* to rejoin. (b) Care must be taken that the replication be filed before the issuing of the *subpæna*, or at least before the return of it, for otherwise, the defendant finding no replication filed before the return of the *subpæna*, shall have the ordinary costs taxed. (c) The court will permit the defendant to withdraw the rejoinder, and to re-

(a) Anon. 1 Vern. 351.

(c) Beam. Cha. Ord. 109; 1

(b) Coveney v. Athill, 1 Turn. Pract. 118.

Dick. 355.

Commission to Examine Witnesses.

de novo, if it is essential to the justice of his
and that he should be allowed to dispute a
fact, and which, otherwise, he would not
ved to dispute, for want of notice. (a)

SECTION II.

Commission to Examine Witnesses.

cause being thus at issue, both parties
to the examination of their witnesses.
as are examined either in the country

or within ten miles thereof, without special order first obtained upon affidavit. (a) But in practice, it seems that few or no commissions to examine witnesses, are now executed within twenty miles of London. (b) And it appears from the recitals in the Orders of 3rd March, 1636, and of the 15th October, 1651, that the examiners have asserted their right to exclude commissioners from that distance. (c) If any commission is made out, or witnesses examined, within the district to which the examiners' office extends, the depositions taken by such commission will, upon complaint, be suppressed. (d) And in a case where the commission was executed, and the witnesses examined at a tavern in Chancery Lane, the clerk in court, who made out the commission, was committed for misbehaviour. (e)

By the rule of the court, the plaintiff is first entitled to sue out a commission to examine witnesses. (f) It is, upon his instance, made part of the above-mentioned order for a *subpœna* to rejoin, that the plaintiff may be at liberty to take out a

(a) Beam. Cha. Ord. 58 and 193. See also note, page 95, in that work, and Gilb. For. Rom. 128. (d) See Beam. Cha. Ord. 193 and 194.

(e) Gilb. For. Rom. 143.

(f) Barnesly v. Powell, 2 Dick. 793.

(b) Hind, 315.

(c) See Beam. Cha. Ord. 86, 121.

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mission for the examination of witnesses, and the defendant should join, and strike commissioners' names, after notice thereof, to his in court, or in default thereof, that the plaintiff may have a commission to examine witnesses, directed to his own commissioners. Under the commission, the defendant may examine *his* witnesses. But if the witnesses for the defendant are far distant from the plaintiff's, or in parts and the seas, where the plaintiff has none; if the latter has no witnesses at all, or neglects to get out a commission to examine, the defendant may obtain an order for a commission to examine witnesses, and have the carriage of it; but the

may make use of this duplicate, and proceed to examine witnesses by virtue of it. (a) If a commission be not executed through the default of the party having the carriage of it, he is to pay the costs of the other side, and to renew the commission at his own expense. (b) And if the commission be executed by one party only, and the other party bring a new commission, the latter party shall pay the costs of both sides thereon, unless the other examine any other witnesses of his own. (c) And the party renewing a commission, is to examine all his witnesses thereon, by the end of the term wherein the renewed commission is returnable. (d)

Previous to the issuing of the commission for either party, the persons to whom it is to be directed, are chosen by the respective clerks in court of the parties, which is technically called joining in commission, and which is done in the following manner: first, he who claims, and has the carriage of the commission, having made application to the clerk in court on the other side to join in commission, names a commissioner; then the other does so also, and so, alternately, till each of them has named four, which the

(a) Harr. Cha. Pract. 245; (c) Beam. Cha. Ord. 72, and
Gilb. For. Rom. 127. 192.

(b) Beam. Cha. Ord. 72, (d) Ibid. 73, and 193,
191, 192.

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ve clerks in court enter in their cause-
and after each has consulted his client in
entry, each strikes two of the four names
manner: first, he that has the carriage of
mission strikes out one of those who were
by the other party, and the other strikes
of those who were named by the opposite
then each strikes out one more, and the
remaining are the commissioners. If a
after having joined in commission with
er party who obtains it, refuses to strike
sioners' names, the court will, on petition,
ut two of them, the clerk in court of the
arty being at liberty to strike out which

sion to examine such witnesses may be obtained upon an affidavit, stating that they are residing abroad, and that they are material, and that the party cannot safely proceed to a hearing of the cause without their testimony. And this commission will be granted, returnable without delay, pending an injunction, against an action, without paying the money into court. (a)

It is proper here to add, that if a party wishes to examine witnesses, who are abroad, in aid of, or in defence to, a suit at law, he must file a bill for the purpose of obtaining a commission for the examination of his witnesses, unless the other party will consent to the issuing of such a commission out of the court in which the action is brought, if brought for the examination of witnesses *de bene esse*, and not in *perpetuam rei memoriam*. The bill must state that an action has been actually brought; it is not sufficient if the bill states an intention to bring an action. (b) But if the object of the bill be, to ascertain facts, upon which, it must depend against whom the action is to be brought, as the bill must necessarily precede the action, it is sufficient, if the bill states the intention to bring the action. (c) The bill usually prays a discovery; and, if the plaintiff is a de-

(a) *Cock v. Donovan*, 3 Ves. and Stu. 83. Sed vide *Phillips v. Carew*, 1 P. W. 116.

(b) *Angel v. Angel*, 1 Sim. (c) *Moodamay v. Morton*, 1 Bro. C. C. 469.

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to the action at law, also an injunction, mean time, to restrain the proceedings in on. This commission may be obtained examination of witnesses at Bencoolen, , [notwithstanding, under the statute of III. c. 63, sec. 44, a court of law, where on was brought, might award a commis- the supreme court of Fort William, or to vor's court of Bencoolen, &c., to take the ation,] upon the ground that there was no court at that settlement, and that it was files from Fort William. (a) The plaintiff ain an order, upon motion, for a commis- the examination of his witnesses abroad; (b)

therefore, entitled to a commission to examine his witnesses abroad. (a) The court will not, in analogy to the practice of courts of law, direct the plaintiff to communicate interrogatories exhibited by him. (b) On an application for a commission to examine witnesses abroad, it is not necessary to state on what points the intended examination is material, (c) or the names of the witnesses. (d) But it is stated in a case, (e) in Brown's Reports, it ought to appear that the matter arose abroad, either by affidavit, or by reading sufficient out of the answer, to show the fact to be so. But this is not requisite, and the practice is otherwise. On an application for a commission to examine witnesses abroad, for the purpose of showing that the legacies given by two codicils, were both intended for the legatee, the legatee ought to swear that he believes that the legacy in the second codicil was meant to be accumulative. (f) But the court will not make any order for this commission, before hearing, where an account must be necessarily directed at the hearing, and

(a) *Sheward v. Sheward*, 2 Ves. and B. 116.

(b) *Butler v. Bulkeley*, 2 Swanst. 373.

(c) *Oldham v. Carleton*, 4 Bro. C. C. 88; *Rougemont v. the Royal Exchange Assurance Company*, 7 Ves. 304.

(d) *Rougemont v. the Royal Exchange Assurance Company*, 7 Ves. 304. Sed vide *Oldham v. Carleton*, 4 Bro. C. C. 88.

(e) *Akers v. Chancey*, 2 Bro. C. C. 273.

(f) *Coote v. Coote*, 1 Bro. C. C. 448.

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the execution of such commission would necessarily delay the account to be directed; the time to apply for this commission, is after account is directed; and the court will not grant it, although the party consents to go to England at the same time, as if the commission had not been granted. (*a*)

The court has refused to grant a commission to examine witnesses abroad, in aid of a defence to an action, on the ground of the delay of the party in making the application; (*b*) or where it was not proved, that the facts alleged as a defence, would constitute a legal defence to a legal demand. (*c*) In a latter case leave was given to convert a

The court will grant a commission to examine witnesses in an enemy's country. (a) If witnesses have been examined abroad *de bene esse*, and a foreign government has refused to let a commission be executed for examining them in chief, the depositions *de bene esse* will be allowed to be read. (b)

Where, under a commission to examine witnesses abroad, the plaintiff dies, but witnesses are examined before notice of plaintiff's death, the examination is regular. (c)

In the commission, the order usually directs, that the adverse party's clerk in court, in a limited time, is to join and strike commissioners' names, and to name an agent, resident in the place, where the commission is to be executed, to whom notice of the execution of the commission is to be given; and that service of such notice on the agent to be good service, or, in default of joining in commission, or naming an agent, the commission to issue *ex-parte*; (d) and it may be made part of the commission, that the commissioners be authorised to swear one or

(a) Cahill v. Shepherd, 12 Ves. 335. Sed vide ———

v. Romney, Ambl. 62.

(b) Gasson v. Wordworth, Ambl. 108.

(c) Thompson's case, 3 P.W. 195.

(d) Hind, 362.

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interpreters, or interpreter, who shall, upon their oaths, solemnly swear, well and truly interpret the oath or oaths, and interrogatories, shall be administered or exhibited to the witnesses to be examined, out of the English language, into the language spoken by the witness, also to interpret their depositions taken to said interrogatories. (a) The solicitor suing the commission, must make an affidavit as sending it out, and receiving it back. (b)

On order for a commission to examine having been obtained, and the names of the commissioners struck, a commission then issues, directed

is in England, and is taken out in the vacation, and has not a certain return, but only *sine dilatione*, it does not expire the first day of the following term, but may be continued in execution the whole of the following term, till the last return. (a) But in case the commission is to be executed abroad, there is no certain time, within which it is to be returnable; but a reasonable time is allowed, according to circumstances. (b) However, according to the opinion of the Vice Chancellor, in *Wake v. Franklin*, the general rule is, that such commission must be returnable before the third return of the following term. (c) A commission may be executed in the afternoon of the day on which it is made returnable. (d) Where the commission is returnable on a day certain, the court cannot extend the time. (e)

If the commission be a joint commission, the solicitor for the party, who has the carriage of it, must give fourteen days' notice to all the defendants who join in such commission, of the time and place for executing it; and for that purpose, he procures a notice in writing to be subscribed by two of his commissioners, specify-

(a) *Barnesly v. Powell*, 3 Atk. 593. See *Harr. Cha. Pract.* 1808, p. 250. See *vide Anonymous*, 2 Vern. 197.

(b) *Wake v. Franklin*, 1 Sim. and Stu. 95.

(c) *Wake v. Franklin*, in 1 Sim. and Stu. 97.

(d) *Moreton v. Moreton*, 1 Dick. 21.

(e) *Hall v. De Tastet*, 6 Mad. 269.

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the title of the cause, and appointing the
and place of meeting; the label annexed
the commission, mentions the names of the
persons to whom notice is to be given. But if
it is directed to be given to a person who
cannot be found, an order may be obtained, that
the master should appoint time and place. (a) The
plaintiff is at liberty to serve any two of the de-
fendant's commissioners with notice of the exe-
cution of the commission; and he is not obliged
to serve such two of the defendant's commission-
ers as the defendant shall choose. (b) In an
answering bill, notice by one of the defend-
ants who had sued out the commission, on the

Though four commissioners generally attend to execute the commission, two are sufficient; therefore, in a case where one commissioner met on each side, and the plaintiff's commissioner went away without doing any thing, whereby the commission was lost, the court ordered the plaintiff to pay the defendant his costs, and granted a new commission, and the defendant to have the carriage of it. (a) And it is not necessary that the two commissioners who attend, should be named, one by each party; for the attendance of the two commissioners named by the party who has the carriage of the commission, will be sufficient; they may act in the absence of the other commissioners named by the other party, but the latter commissioners cannot act in the absence of the former, unless there is a duplicate of the commission; in which case, if the commission is not produced by the party who has the carriage of it, the other party's commissioners may proceed in executing the duplicate. (b) But the commission, or a duplicate, must be produced at the time when the witnesses are examined; except in a case where the commissioners meet and examine, and afterwards adjourn; and one of the defendant's commissioners takes away the commission, and the

(a) Harr. Cha. Pract. 1808, p. 247. Gilb. For. Rom. 130. (b) Harr. Cha. Pract. 1808, p. 247.

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er commissioners meet at the day appointed, examine witnesses, and return the depositions; the court will, in this case, order such depositions to remain sealed up, and a *subpœna* *tes tecum* to issue against the commissioner who takes away the commission, that he may bring his authority, by virtue of which the depositions are taken; and in such a case, it seems that if the commissioners had proper authority, the not bringing the commission before them, does not impeach the depositions. (a)

The commissioners having met according to the order, are to proceed to open the commission,

not adjourning is considered as a refusal of the commissioners to act any further under the commission. (a) But if the commission be not *opened* at the first meeting, he who has the carriage of it may execute it at a subsequent meeting, by giving a new notice, although there was no adjournment. (b) However, supposing it to be by his fault that the commission was not executed, the other side may obtain an order to stay proceedings till the costs of the former attendance of his commissioners and witnesses, are paid. (c) So, where a renewed commission is granted in consequence of the former one being lost by the neglect of the commissioners of the party who had the carriage of the commission, we have seen that that party shall pay the other party his costs. When an adjournment is necessary, it is usual to make a memorandum thereof, which the commissioners ought to sign.

SECTION III.

The Examination of Witnesses.

The commissioners and their clerk having qualified themselves to act, by taking the oaths, (d)

(a) Gilb. For. Rom. 129.

Rom. 129, 130. Beam. Ord.

(b) Ibid.

Cha. 72.

(c) Harr. Cha. Pract., edit.
of 1808, p. 248. Gilb. For.

(d) It seems that formerly
the commissioners were not

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y are then to examine the witnesses produced
the meeting.

The witnesses are examined upon written inter-
rogatories, prepared or perused, and signed by
counsel for that purpose, (a) and which were
sufficiently annexed to the commission; but are
not, by consent of parties, delivered to the com-
missioners at the opening of the commission. (b)
These interrogatories are to be drawn only upon
material points, and not upon matters which are
either confessed in the pleadings, or are imperti-
nent or needless to be proved. (c) And witnesses
are to be sorted by those who produce them, that

to be examined is then called before the commissioners, who administer the prescribed oath to him, having previously caused all persons, but themselves and their clerks, and the witness, to quit the room ; and if a person named as a commissioner, refuses to qualify, he ought not to be permitted to be present. (*a*) When a Peer is examined as a witness, he must be on his oath. (*b*) As to the examination of a Quaker as a witness, the reader is referred to Beam. Cha. Ord. 247.

The party suing out the commission, has a right to examine the first witness : previous to the examination of each witness, the solicitor for the party for whom he is to be examined, prepares a note, containing the name, rank, or occupation, age, and place of abode, of the witness, and of the several interrogatories to which he is to be examined. This note is to be delivered to the commissioners at the same time the witness is sent to them ; a similar note is usually sent to the solicitors for the other parties, that they may have the witness cross-examined, if they think proper. If the witness is to be cross-examined, that ceremony ought to take place, immediately after he has been examined in chief, and without suffering him to go abroad. (*c*)

(*a*) *Shaw v. Lindsey*, 15 Ves. 380. 1 P. W. 146. See Beam. Cha. Ord. 105.

(*b*) *Mears v. Lord Stourton*, (*c*) *Gilb. For. Rom.* 128.

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mode of compelling the attendance of witnesses to be examined, either under a commission, or in the examiners' office, is by a *subpoena testificandum*, to be served personally on the witness, (a) which may be procured by leaving a writ for it at the *subpœna* office. Three witnesses only can be inserted in one *subpœna*, and husband and wife are considered as several witnesses. (b) But this process need not be resorted to if the witness will voluntarily attend to be examined. If he refuses to attend, and the examination is before commissioners, at the time that he is served with a *subpœna*, he is also served with a writ, signed by two or more of the commis-

examination, it may be enforced, by adding to the ordinary writ of *subpœna* a clause, specifying the document or writing which is wanted, and requiring him to procure it. Under this process, the party may, in court, object to the production; and if the objection be overruled, production is compelled. (a) An attorney, a witness to a deed, and in possession of the same, cannot be compelled to attend with the deed at the hearing of the cause, otherwise than by a *subpœna duces tecum*. (b) A solicitor who has been served with a *subpœna duces tecum*, for the purpose of having a deed in his possession proved on the behalf of the plaintiff, cannot object to the production of the deed, on the ground that he had a lien on it for costs due from the defendant; if he does, the court will order him to produce the deed at his own expense, and to pay all the costs consequent on his refusal. (c)

If a will of real estate is to be proved in the cause, the original will must be obtained from the Commons, or other ecclesiastical court, for which an application must be made at the prerogative office, if proved there; and a clerk will be directed to attend with it at the exa-

(a) Field v. Beaumont, 1 Swanst. 209.

(c) Brassington v. Brassington, 1 Sim. and Stu. 455.

(b) Busk v. Lewis, 6 Mad. 29.

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or before the commissioners, and will
back to the prerogative office, when the
of its production has been answered.

re a deed or other document necessary to
uced on the part of the plaintiff, is admitted
defendant's answer to be in his custody or
ion, and he refuses to leave it with the
er to be proved in the cause, the court, on
will order the defendant to produce and
with the examiner. (a) But the court
make such order, unless the fact of the
ion of the deed by the defendant, appears
answer; an affidavit cannot be read to

tion ; (a) upon a proper certificate of the fact from the commissioners or examiner, as the case may be, an order may be obtained, that the witness should do the act in question, within a certain time, or stand committed. If the witness still continues contumacious, another order may be obtained upon affidavit made and filed, of the personal service of the first order, and a certificate from the commissioners, or examiner, that it has not been obeyed, that the witness should stand committed to the Fleet. The order for the commitment is delivered to the tipstaff, or to the warden of the Fleet, who will obtain a warrant thereon from the Lord Chancellor's secretary, and will apprehend the witness upon the authority of the warrant ; and the latter must remain in the Fleet, until he not only submits to his duty as a witness, but has paid the costs incurred by his contempt.

Commissioners are not bound to examine each witness upon all the interrogatories, but they may examine them to those interrogatories, or parts of interrogatories, only, to which they were called upon to examine ; commissioners are not bound to divest themselves entirely of all discretion, as to what is or is not legal evidence ; and they are not obliged to take all that is offered to them,

(a) Before the Vice Chancellor, in Trin. T. 1815.

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, or before the commissioners
back to the prerogative off
e of its production has been

before the
ere a deed or other d to be ex—
duced on the part of turn the ob—
defendant's answer which, together
sion, and he answered to the two
ner to be towards the cause, to copy
n, will interrogatory as was demurred to,
it w to disclose any part of the deposi-
ot and then the commission is to be sealed
and delivered to the six clerk in the cause. (b)
demurrer is afterwards argued before the

murrer; (a) and the court will direct a new mission to issue if necessary. (b) A defendant cannot demur to a bill but for matter appearing in the bill itself; but a witness may demur to what is *dehors* the interrogatory; because he has no other way to relieve himself but by demurring. (c) A witness demurring, as an attorney, if his answer would violate the confidence reposed in him as such, must name the party to whom he was attorney. (d) And a witness cannot demur to interrogatories for irrelevancy. (e) There is a case where a motion, having been made to suppress depositions, on the ground that the witness was a confidential attorney and solicitor of one of the parties, the court referred it to the Master, to inquire, which of the matters in the depositions came to the knowledge of the witness, as confidential attorney and solicitor; (f) but it seems that this case has not been followed. (g)

A commissioner, if he has not acted as such, may be examined as a witness; but he cannot,

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| <p>(a) <i>Parkhurst v. Lowten</i>, 3 Mad. 123; <i>Ibid.</i> 2 Swanst. 194.</p> <p>(b) <i>Morgan v. Shaw</i>, 4 Mad. 56; <i>Parkhurst v. Lowten</i>, 2 Swanst. 194.</p> <p>(c) <i>Nightingale v. Dodd</i>, Moa. 230.</p> | <p>(d) <i>Parkhurst v. Lowten</i>, 2 Swanst. 194 and 201.</p> <p>(e) <i>Ashton v. Ashton</i>, 1 Vern. 165.</p> <p>(f) <i>Sandfert v. Remington</i>, 2 Ves. J. 189.</p> <p>(g) See <i>Parkhurst v. Lowten</i>, 3 Mad. 121 and 124.</p> |
|---|---|

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he has been sworn, and witnesses have been
ned before him ; his having been examined
itness does not prevent him from afterwards
g and executing the commission. So, if it
ecessary to examine the clerk to the commis-
s a witness, he must be examined, before he
rn as clerk. (a)

r the witnesses are examined, their depo-
are to be engrossed on parchment by the
and examined carefully with the paper
; and the commissioners are then to sub-
their names to each skin of parchment; and
errogatories and depositions thus engrossed

named by the plaintiff to keep ; and the other part thereof is delivered to one of the commissioners named by the defendant ; or, which is more usual, the plaintiff's and defendant's commissioners keep the drafts of the adverse party's witnesses. (a)

These precautions are necessary, as the court has ordered, where the commission was lost, the commissioners, in whose custody the paper draft was, to return the same unopened ; and that the same should be delivered to the six clerk, unopened, and be engrossed, and that such engrossment should be filed and made use of as the original deposition might have been. (b) But, in a subsequent case, where the ship, in which the depositions of witnesses examined abroad were sent to England, was lost on the passage, the court ordered the commissioners to transmit the drafts of the depositions, and to certify the circumstances of the return of the commission, but would not make any order for reading the drafts of the depositions, on the hearing of the cause, until after the commissioners had made their return and certificate. (c)

The commission is to be delivered to the clerk in court who had the custody of the commission, either by the person who received it from the

(a) Hind, 351.

(c) Burn v. Burn, 2 Cox,

(b) Jones v. Donithorne, 1 426.

Dick, 352.

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tioners, and to whom they are personally delivered it, or by one of the commissioners. In the former case, the person to whom the commission is delivered goes before a Master, and swears that he received the commission from the commissioners, and that it has not been opened or tampered with since he received it. But if the commission is carried by one of the commissioners, no oath is necessary. And where the commission or depositions were lost on the road, and picked up by two travellers, on an affidavit that they had not been opened or altered the same, the depositions are ordered to be received. (a)

the court will direct the examiner to wait upon the witness to take his examination. (a) The interrogatories, upon which the witnesses are intended to be examined, having been properly engrossed, are first to be left with the examiners at the seat at the examiners' office; and this is termed filing interrogatories. Before the witness is to be examined, the name of the clerk in court of the adverse party, must be delivered to the examiner's clerk; (b) and the witness was then produced by the examiner's clerk, at the seat of the adverse clerk in court, where the examiner's clerk is to leave a notice, in writing, of the name and place of residence of such witness, in order to prevent him from being personated, and to give an opportunity for cross-examination. (c) But, by the 25th of the General Orders of 1828, no witness, to be examined before either of the examiners, for any party in a cause, shall be in future produced at the seat of the clerk in court for the opposite party; but that a notice in writing, containing the name and description of the witness be served there, as heretofore. And, by the 26th of the General Orders, the examiner, who shall take the examination in chief of any witness, shall be at liberty to take his cross-examination also. The witness is then sworn to the interrogatories

(a) *Shakel v. the Duke of Marlborough*, 4 Mad. 463.

(c) Beam. Cha. Ord. 185, 262; Harr. Cha. Pract. edit.

(b) *Cholmondeley v. Clinton*, 2 Mer. 81.

of 1808, p. 261.

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a Master in Chancery, to whose office he is accompanied by the examiner's clerk; and is examined upon the filed interrogatories in the examiners' office. In the case of *Whittuck v. [illegible]*, (a) the six clerks certified to the Vice-Chancellor, that the party examining a witness in the examiners' office, is bound to keep him in London forty-eight hours after his production at the office of the adverse clerk in court, and not forty-eight hours after the examination is finished; and that the cross-interrogatories are left with the party within the forty-eight hours, then the producing him must keep him in London until the cross-examination is finished. And it was

not to be examined after the day of publication, though sworn before, so as a copy of the rule be delivered to the examiner, (a) and they are to subscribe their depositions before they depart from the examination; and they are not to be permitted to make any alteration thereof, after, without leave of the court, unless it be in some circumstances of time, or the like, or for making perfect of a sum, upon view of any deed, &c., which the witness shall show to the examiner before he admits such alteration to be made. (b) The examiner is not to permit the witness to have the interrogatories, and pen his own depositions. (c)

If the witness is confined in prison, within twenty miles of London; or is incapable, by sickness or infirmity, of attending the examiners' office, and is residing within the same distance, he is attended, at the place of his confinement or abode, by the sitting Master, and by the examiner, and is there sworn and examined in the usual manner. Two days' notice, in writing, specifying the name of the witness, and the place where he is to be examined, ought to be given to the adverse clerk in court, to afford the other party an opportunity of cross-examining the witness; and the interrogatories for the examination of the witnesses ought previously to be left with the ex-

(a) Beam. Cha. Ord. 73 and
186.

(b) Beam. Cha. Ord. 74.
(c) Ibid. 187.

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and he apprised of the intended examina-

en happens, that a party finds it necessary
examine some witnesses, in the examiners'
and others, under a commission; in this
is not obliged to file his whole set of
interrogatories in the examiners' office, but such
apply to the examination of the witness in
And if, under a commission, the de-
exhibits only a part of his interrogatories,
as (*inter alia*) the interrogatory, which had
been filed in the office, to prove a will in question,
the witnesses to the will appear under

person whose duty it is to examine the witness, shall take down what comes from him on his examination, and not permit the witness, on his own reading the interrogatories, to set it down himself, (a) nor take from him a deposition already prepared. (b) But a witness may be allowed to use short notes, which he brings with him to assist his memory. Scandalous or impertinent answers are not to be taken down, (c) but only such as are material to the points interrogated to.

After the deposition of the witness is taken down, and before it is signed by him, it must be distinctly read over to him, in order that any mistake made in it may be rectified; after which it must be signed by him. Till then, the examination is not complete; therefore, if the witness dies before such signature, the depositions cannot be made use of. (d) But it may be read, notwithstanding his death before he could be cross-examined. (e)

If a party wishes to cross-examine his adversary's witness on a fact which he is called to prove, cross interrogatories should be prepared for that purpose, on which the witness may be examined after his examination in chief. Indeed, it is advisable (although, perhaps, such is not the modern

(a) Beam, Cha. Ord. 187.

(d) Copeland v. Stanton, 1

(b) Shaw v. Lindsey, 15 Ves. P. W. 414.

380.

(e) O'Callaghan v. Murphy,

(c) Anonymous, 2 P.W. 405. 2 Sch. and Lef. 158.

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) to introduce a general question, or interrogatory, to be applied to each witness on the issue, whether he was or was not interested in the event of the suit: it seems that such was an ancient form of interrogatories. (a) There is a cross-examination as to the execution of (b) and an objection as to the competency of the witness, from interest, is not waived by cross-examination, if the party who cross-examines him, is aware of the objection at the time. (c)

proper here to point out the steps which are taken in a case of irregularity, in the mode of examining witnesses. If, after the depositions

had been referred for impertinence, and the Master had reported them impertinent, and the witness took exceptions, Lord Hardwicke ordered it to stand over till the hearing, being doubtful whether a deposition could be referred for impertinence only. But depositions may be referred for scandal and impertinence. (a) If the interrogatories are found to be leading, or scandalous and impertinent, the court will order the depositions taken upon them to be suppressed; but where that was done on account of the interrogatory being leading, the court, being satisfied that the interrogatory in question was not framed with any improper design, has permitted, in order to prevent the loss of material evidence, the witness to be re-examined upon new interrogatories, to be settled by the Master. (b) In like manner, if the Master certifies the depositions to be scandalous and impertinent, the court will order them to be suppressed, although the interrogatories were rightly framed. (c) But the witness will not be ordered to pay the costs, it being the commissioners' fault, that they took down such depositions. (d) It is not considered as a species of impertinence, that many witnesses are examined

(a) *Cooks v. Worthington*, 2 Atk. 234 and 235.

(c) *Cooks v. Worthington*, 2 Atk. 234 and 235.

(b) 1 Eq. Ca. Abr. 232; Lord Arundell v. Pitt, Ambl. 585.

(d) *Anonymous*, 2 P. W. 405.

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the same fact, provided the fact be in issue; if a defendant had charged himself, by his answer, to the full amount sought by the bill, or if the issue were closed as to any particular fact, by a voluntary admission of the defendant, depositions taken at this point would be foreign and irrelevant. (a) Depositions will be suppressed, if they have been taken already prepared; (b) as if the deposition is taken from a witness, using, during the examination, full minutes in writing, which she has had in her possession, and which she has not had have been originally her own, put into writing by the attorney, and so copied, with some alterations, by herself; (c) or if the commissioners take down depositions different from what

clerk of the name of the clerk in court of the adverse party, (a) or any other irregularity be committed before taken notice of, or the depositions be returned so badly written, as that they are not legible. (b) But such suppression will be made, without prejudice to the witness being again examined. (c) When a re-examination is thus permitted, witnesses having been cross-examined as well as examined in chief by the party who had the order for re-examination, the cross-examination, as well as the examination in chief, ought to be repeated. (d) And where depositions have been suppressed, for want of notice, until after publication, and the omission has been accounted for, an option has been given to examine the same witnesses, or to allow the depositions to stand, with liberty for either side to cross-examine witnesses, and to examine others. (e) And if a party's witness, before he is cross-examined, secretes himself, his depositions will be suppressed, unless such party procures him to attend within a given time. (f) Where a commission to examine witnesses abroad had been executed and

(a) *Marquis Cholmondeley v. Clinton*, 2 Mer. 81.

(d) *Perry v. Silvester, Jacob*, 83.

(b) *Gilb. For. Rom.* 148, 149, and 150.

(e) *Cholmondeley v. Clinton*, 2 Mer. 81.

(c) *Vide Shaw v. Lindsey*, 15 Ves. 380; *Marquis Cholmondeley v. Clinton*, 2 Mer. 81.

(f) *Howerday v. Collet*, 1 Dick. 288.

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d, the defendant not being prepared with
atories to cross-examine, a new commis-
as granted for that purpose, upon the
nt stating whom he wished, and under-
cross-examine; the court, however, re-
o suppress the plaintiff's depositions. (a)
rk in court indorses on the suppressed
ons "suppressed." (b) But where the
ons are suppressed, that does not go the
of preventing the court directing hereafter
e depositions may be opened, if necessity
require, that the rule should be dispensed

the interrogatory and depositions, the court will order that the commissioners be at liberty to correct the error in the title of the several sets of interrogatories exhibited under the commission, and that the examiner be at liberty to make the same alterations in the title of the interrogatories filed in his office, and that commissioners and examiner be at liberty to correct the mistake in the depositions, and to reswear such witnesses examined as should be willing to be resworn, to the truth of the depositions so altered.(a)

There is no order, prohibiting witnesses from communicating their testimony. (b) It is, however, thought important to prevent these communications between witnesses and parties. (c) But the court will not suppress the depositions of witnesses examined for the defendant, after conversation by him with one of the plaintiff's witnesses, on the subject of his testimony; the conversation not having been communicated to his solicitor, before the interrogatories of defendant had been prepared. (d) An irregularity in the mode of examining witnesses may be communicated to the court by any of the commissioners, by certificate, without affi-

(a) *Curry v. Bowyer*, 3 Swanst. 357.

(c) *Broughton v. Pierrepont*, 3 Swanst. 556.

(b) *Broughton v. Pierrepont*, 3 Swanst. 552.

(d) *Ibid.* 550.

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but if the complaint is made by the party
it must be stated upon affidavit.(a)

When depositions are offered in evidence, in a
law, they may be read, notwithstanding
interrogatories on which they are taken are
; the other side ought to have applied to
the court in which they were taken, to have them
admitted, on that account. (b)

When a witness is to be examined, who is a
foreigner, and who does not understand English,
before an examination is obtained, that the interrogatories
shall be interpreted to him by a person to be

that in a commission to examine witnesses abroad, power is usually given to the commissioners to swear an interpreter, well and truly to interpret the oath and interrogatories, which should be administered and exhibited by either party to examine witnesses, out of the English language into the language of the witness, and also to interpret their depositions to the said interrogatory; under such a commission, although it appears by the return, that the depositions, in the first instance, were reduced into writing in the foreign language, and translated by the interpreter into the English language, within an interval of six weeks, yet the commission will be considered as well executed, by the commissioners returning the depositions, so translated into the English language. (a) If the depositions are taken down in the language of the witness, they are afterwards translated out of that language into the English language, by a person likewise appointed by the court for such purpose, who is sworn to the truth of his translation. But the court will not make an order, that the record of the depositions shall be delivered out of the office, in order that they may be translated. (b) The translation, after the truth of it has been sworn to, is annexed to the record, and an office copy made of it, which will be permitted to be read at the

(a) *Atkins v. Palmer*, 4 Barnw. and Alder. 377.

(b) *Fauquier v. Tynte*, 7 Ves. 292.

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, an order for that purpose having been
sly obtained, which is usually applied for
same time that the application is made for
pointment of a person to translate the depo-

material here to observe, that in equity,
ertain restrictions, a plaintiff may examine
dant.(a) But he cannot afterwards have
e against him, in the matters as to which
examined ; but the plaintiff may have a
on other matters, to which he was not
ed.(b) If, from the nature of the case,
fendant, in the first case, would be *pri-*
~~vable to the plaintiff and another defend~~

out consent of defendant, by motion, strike the name of a co-plaintiff, whom he wishes to examine, out of the bill, on giving security for costs. (a) And the rule as to costs, applies to the case of a next friend, struck out as a co-plaintiff. (b) Neither can a defendant examine an involuntary plaintiff. (c) But if the plaintiff consents to be examined by the defendant, the court will make an order for his examination, (d) leaving the question, whether his deposition can be read, to be decided at the hearing. (e) And a defendant may examine a *prochein amy* of an infant plaintiff. (f) But if such person is wanted as a witness by the plaintiff, we have seen that the name of the *prochein amy* must be struck out of the bill, and the name of some other responsible person substituted. (g) Before a party can be examined as a witness, an order must be obtained for that purpose, and produced at his examination; but if both sides examine a witness without an order, it is well; for each hath allowed thereby him to be a good witness. (h) If a person who has been examined as a witness for the plaintiff, be afterwards

(a) *Lloyd v. Makean*, 6 Ves. 145.

(b) *Wilts v. Campbell*, 12 Ves. 493.

(c) *Bird v. Owen*, Mos. 312.
Whately v. Smith, 2 Dick. 650.
Sed vide Armiter v. Swanton,
Ambl. 393. *Troughton v. Ges-*
ley, 1 Dick. 382.

(d) *Whately v. Smith*, 2 Dick. 650.

(e) *Walker v. Wingfield*, 15 Ves. 178.

(f) *Bird v. Owen*, Mos. 312.

(g) *Mitf.* 26.

(h) *Wy. Pract. Reg.* 419.

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defendant, and is not interested in the suit, evidence may be read; and there is no occasion for an order, as he was not a party at the time of his examination; nor could it then be that he would become a party afterwards.)

An order is of course, before a decree; but before a decree, a special ground must be made for it, but all these orders are made upon a condition, that the party is not concerned in the matter, in the matters in question; and they are granted without a clause, saving just as to the other side. (c) But an order

duced at the execution of the commission, or at the examiner's office, where the party attends to be examined. But if the defendant's answer has been replied to, the plaintiff cannot obtain this order, without first withdrawing the replication. (a)

After a party has examined witnesses upon interrogatories, it frequently becomes necessary for him to examine other witnesses, on fresh interrogatories. Interrogatories for such purpose may be exhibited; (b) if the examination has been in the examiner's office, no order is necessary, (c) unless publication has passed; in such case, an order is requisite, and also an affidavit, by the party, his clerk, and solicitor, denying their respective knowledge of the former depositions. (d) But if the examination be before commissioners, no interrogatories can be exhibited without an order. (e) However, where the cause is not set down, and the fact to be proved is only a title by representation, the court will allow a new commission for the examination of further witnesses. (f)

(a) *Winter v. Kent*, 2 Dick. 595. 2 Fowl. 100.

(b) *Lewis v. Owen*, 1 Dick. 6.

(c) *Beam. Ord. Cha.* 96 and 123. *Andrews v. Brown*, Pre. Cha. 385 and 386. *Anonymous*,

1 Eq. Ca. Abr. 233. *Harr. Cha. Pract.* 1808, p. 273.

(d) *Anonymous*, 1 Vern. 253.

(e) *Harr. Cha. Pract.* 1808, p. 273.

(f) *Cutler v. Cremen*, 6 Mad. 253.

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Though it is usual in country causes, to de-
fer the interrogatories, and the cross-interro-
gatories to the commissioners, at the time that
the commission is opened, yet it is the practice
to employ the commissioners from time to time
to interrogatories for the examination or cross-
examination of witnesses until the commissioners
have closed the commission. (a) Thus, a
party who had omitted to cross-examine a wit-
ness under a commission, at the period when his
examination was finished, was allowed to exhibit
interrogatories for that purpose, on a subsequent
day, but after the commission has been closed,
no further commission is necessary, if witnesses are
not to be examined by interrogatories.

the re-examination of a witness, in order, upon looking into papers which, in consequence of a mistake, as to the time of his examination, he had omitted to do, he might answer more fully and precisely. (a) But in subsequent cases, the court has refused to permit the re-examination of a witness for the purpose of explaining or correcting, or adding to, his former evidence. (b)

And it is proper to observe, that if one party has examined witnesses under a commission, in which the other party did not examine witnesses, the latter party may, before publication has passed, of course obtain an order for a commission to examine his witnesses; and even after publication, he may obtain a similar order, or that he may examine at the examiner's office, upon affidavit by the party, his clerk in court, and solicitor, that neither of them is apprised of the contents of the depositions taken in the cause. Where a joint commission had issued, and the defendant had commissioners present when it was executed, but had not interrogatories, the court refused the defendant a new commission, although the party made an affidavit that he had not seen, nor knew, the contents of the depositions. (c) But in another case, the court grant-

(a) *Kirk v. Kirk*, 13 Ves. Birch, 5 Mad. 66. *Ashee v. Shipley*, 5 Mad. 467; and 280.

(b) *Lord Abergavenny v. see Beam. Cha. Ord. 74.*

Powell, 1 Mer. 130. *Bott v. (c) Mineve v. Row*, 1 Dick.

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defendant a new commission ; (a) and we see that in a case where a commission was issued abroad, and where the defendant had the opportunity given him of cross-examining the plaintiff's witnesses, the court granted the defendant a new commission, to be directed to the commissioners to cross-examine the plaintiff's witnesses, and the defendant was required to do so by affidavit, whom he wished and under oath to cross-examine. (b) And generally if a satisfactory account is given, why the defendant's witnesses were not brought before the commissioners at the first examination, the court will allow a new commission for cross-examining, and

quest of the plaintiff, as a matter of accommodation to the latter, and there would have been sufficient time for executing the commission, if the business had gone on regularly, the court will grant the defendant a second commission. (a) If a renewed commission is granted, the party obtaining it, shall bear all charges of such commission; but if the other side examines any witnesses of his own, he shall pay his own part of the charge. (b)

On this subject of the examination of witnesses, it is necessary to remark, that although the usual course of examining witnesses in equity, is on written interrogatories prepared for the purpose, yet there are some matters which may be proved by a *vivâ voce* examination at the hearing, such as deeds, writings, or other documents, which may be proved upon the production of them, without entering upon any examination, which will admit of cross-examination. (c) But in the case of a will, this mode of proof at the hearing is not permitted, because the due execution may come in question, which cannot be examined to *ore tenus* at the hearing of the cause. (d) The account books of the collector of a former rector in a tithe suit, cannot be proved in this mode; be-

(a) *Turbot v. ———*, 8 Ves. 315.

(c) *Pomfret v. Windsor*, 2 Ves. 472 and 479.

(b) *Harr. Cha. Pract.* 1808, p. 248.

(d) *Eade v. Lingard*, 1 Atk. 203.

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it will be necessary to prove something
the hand-writing. (a)

said, in the Wy. Pract. Reg., (b) that deeds
owed to be proved *viva voce* at the hearing,
all and answer. But this evidence is not
ed to prove witnesses' hands who are
) But the court has a right itself, when-
sees fit, to examine, *viva voce*; (d) and the
has permitted an examination *viva voce* by
t, in a case where, regularly, such an ex-
on is not allowed. (e) And in the case of
bit attempted to be proved at the hearing,
art will examine *viva voce* upon the sugges-

two days previous to the hearing of the cause, upon the adverse clerk in court. When the cause is called on, the original order, the exhibit, and the witness, are produced to the register in court, who swears the witness, and examines him to the execution. The attendance of the witness may be enforced by process of *subpoena*, returnable on the day when the cause is set down to be heard; it is to be served personally on the witness, like the *subpoena*, to testify in the examiner's office.

We have hitherto supposed that the stage of the cause, at which the parties are examining their witnesses, is the regular time for that purpose; but, under particular circumstances, they may, in a prior stage of the cause, obtain leave to examine witnesses *de bene esse*. If a party in a suit in this court, or in a suit at law, has a material witness to examine, who is so infirm, that there is reason to suppose that he will not be alive at the regular period for his examination; (a) or is of the age of seventy; (b) or is speedily going abroad, and not likely to return in time to be examined, (and going to Scotland is a sufficient ground;) (c) or

(a) Harr. Cha. Pract. 1808, p. 278; Bellamy v. Jones, 8 Ves. 31.

(b) Rowe v. ———, 13 Ves. 261; Fitzhugh v. Lee, Ambl. 65.

(c) Bellamy v. Jones, 8 Ves. 31; Birt v. White, 2 Dick. 473; Botts v. Vereleat, 2 Dick. 454;

sed vide anonymous, 19 Ves. 321.

appearance, after the defendant has been served with a *subpæna*. (a) Examination *de bene esse* has been granted to plaintiffs in a bill to perpetuate testimony, after *subpæna* has been served; but before appearance of infant defendants in contempt, a messenger having gone, and his return being that they had absconded, and were not to be found, on affidavit of the materiality of the evidence, and danger of loss, and an undertaking to proceed with all due diligence to issue, and examination in chief, the compliance with such undertaking to be proved before publication of the depositions *de bene esse*. (b) And the court has granted this order, where the witness was only of the age of sixty, where the parties lived in Virginia, in North America; and, consequently, it would be long before they could be served with process; and possibly, when they were, might not pay regard to it. (c) Where the application is made upon the ground, that a material fact lay in the knowledge of a single witness, it seems to have been the opinion of Lord Thurlow, that the affidavit ought to explain how that happened to be the case. (d) In this case it is not sufficient for an

and Stu. 83 and 92; *sed vide* (c) *Fitzhugh v. Lee*, Ambl. 65.

Phillips v. Carew, 1 P. W. 117. (d) *Parsons v. Ward* in

(a) *Wilson v. Wilson*, before Chancery, 2d Seal after Hilary the Vice Chan. 31 July, 1815. T. 1785.

(b) *Frere v. Green*, 19 Ves.

319.

The Examination of Witnesses.

of the party making the application to that he was informed by the witness, he prove the particular fact, and that he believes is the only person who can prove it, not on the ground of such belief. (a) Where application is made on the ground, either that the witness is dangerously ill, or of the age of the witness, notice of it is not necessary; (b) but, in other cases, it seems notice must be given; in all cases, notice of executing the commission is indispensable. (c) The depositions of a witness, who has been examined *de bene esse* in the evening of the day on which the deposition for his examination was obtained, may be

petuate the testimony of witnesses, the defendant may, under the plaintiff's commission, examine witnesses. (a)

It is proper here to call the attention of the reader to the distinction between bills in *perpetuam rei memoriam*, and bills for the examination of witnesses *de bene esse* upon any of the grounds stated in a former page. Bills of the former description are filed by persons in actual and undisturbed possession of property, to which the title can by no means be made by them the subject of present judicial investigation; and, therefore, it is absolutely necessary, in order to prevent a failure of justice, that they should have the means of preserving the testimony of their witnesses, although they may not stand in the predicament of aged or infirm witnesses, or witnesses going abroad; or, although the party may not have only one witness to prove a material fact. But if a person is out of possession, or, if in possession, is disturbed in it, either by an actual trespass on him, or by having an action brought against him as a tortious holder, he may assert and ascertain his right, either in an action, to be brought by him, or in the action brought against him; and, therefore, he can have no occasion for the aid of a court of equity, unless he can show that he is in danger of losing his testimony before the suit, which is actually com-

(a) *Earl of Abergavenny v. Powell*, 1 Mer. 434.

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d by or against him, is brought to a trial. If he can make out a case of that description, and an action has actually been brought, he files a bill, not to perpetuate the testimony generally, but to prevent the loss of it before the trial; and he annexes to it an affidavit to his bill, that his witness or witness fall within some one of the descriptions above mentioned, will make the bill decidable. (a) The cases, among others, in which a bill *perpetuam rei memoriam* may be brought, are: (a) to prove a devise in possession; against the heir to the will *per testes*; to prove a modus; (b) to prove the plaintiff's sole right of fishery; (c) to prove the testimony of an usurious contract by

witness returns to this country before the commission had reached its destination, the court will not make an order for his examination *de bene esse*, but the bill must be amended. (a)

If a witness has been examined, to whom an objection may be made with respect to *credit*, articles (as they are called) on this ground may be exhibited against him, alleging the fact upon which the objection arises. If the depositions sought to be impeached were taken in town, the articles must be filed in the examiner's office; (b) if under a commission in the country, in the six clerk's office, and should be annexed to the depositions objected to. After this, an order may be obtained (upon a certificate by the examiner, or by the six clerk, that the articles have been filed), that the party applying should be at liberty to

answer thereunto made, and the defendant, or his attorney, made acquainted with the names of the witnesses, that the plaintiff would have examined; and so publication to be of such witnesses, with this restraint, nevertheless, that no benefit shall be taken of the depositions of such witnesses, in case they may be brought *vivâ voce* upon the trial, but only to be used in the case of death, be-

fore the trial, or age, or impotency, or absence out of the realm at the trial.

(a) *Atkins v. Palmer*, 5 Mad. 19.

(b) *Beam. Cha. Ord.* 187 and 188. Note. This Order says, that the examiner shall not examine any witnesses to credit, but by special leave of the court, which is sparingly to be granted.

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the witnesses in support of the objection to the credit of the witness in question; that a commission should issue if necessary. An order may be obtained to examine to the oath of a witness, after publication, without delay; (a) although five months had elapsed since publication, the court has, upon special application, made the order, with the qualification that it shall not delay the hearing of the cause. (b) If a commission is necessary, the order is, that the witness be at liberty to take out a commission, and to the commissioners in the former commission; (c) and, whether the proposed examination be before commissioners, or in the ex-

further observes, on this subject, that the application is of a kind always regarded with great jealousy, for an examination to the credit of a witness, who has been examined in the cause; the court, to support its rules, requires that the examination should be only to the credit of a witness, and to facts affecting credit and character only; and those not material to matters in issue in the cause. (a) But on the application to examine as to credit, the court does not previously consider whether the examination relates to the matters in issue; but if the examination should be extended to try facts in issue, the depositions will be suppressed.(b)

Lord Hardwicke, in the case of *Gill v. Watson*,(c) observes, that although, at law, you can examine only to general credit, yet it is otherwise in equity; for at law, the witness cannot be prepared to defend every particular action of his life, as he does not know as to what they intend to examine him; but upon the examination in this court, he may be able to answer any particular charge, as he has time enough to recollect it. But the reporter makes a *quære*, if there is any distinction between the examination here and at law, with respect to

(a) *White v. Fussell*, 1 Ves. and B. 153.

(b) *Carlos v. Brook*, 10 Ves. 49.

(c) 3 Atk. 521.

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credit of witnesses. And Lord Eldon (a) that, by the rule of the Court of Chancery, attention to credit was limited to general impressions, whether the witness is to be believed on his oath. (b)

leave of the court, to examine witnesses as cross-examined, is necessary, as well before, as after publication; (c) and a case has occurred, where a witness, before publication, examined with reference chiefly to the character and credit of the witness of the other side, without an order previously obtained, the court referred it to the jury to inquire whether the interrogatories

would seem, that the same mode of proceeding is to be observed with respect to the examination of witnesses as to credit, both before and after publication. The court will allow these articles to credit after publication, (a) because the matters examined on such cases are not material to the merits of the cause, but only relative to the characters of the witnesses; and yet a commission is rarely granted into foreign parts, to support such articles (and Ireland, though belonging to the dominions of the crown of Great Britain, with respect to the jurisdiction of this court, is considered as a foreign part), because this would introduce a certain method of delay; and if it is ever to be granted, upon great necessity, in a case of consequence, the only ground of it must be, that no person in England could swear any thing as to the witness's credit. (b) And if a party, who has obtained a commission to examine as to credit, delays the execution of it until after the decree, he will be made to pay the costs. (c) The other party, whose witness is thus attacked, may support by evidence his credit. (d)

If the objection is to the *competency* of a witness, it may be inquired into upon examination; for

(a) *White v. Fussell*, 19 Ves. 127.

(b) *Callaghan v. Rochfort*, 3 Atk. 643.

(c) *White v. Fussell*, 1 Ves. and B. 151.

(d) 1 *Turner's Cha. Pract.* 225.

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may be a general interrogatory to every
who is examined, whether he has any
(a) And if such an interrogatory has
been introduced, and it has been discovered
after publication, that some of the witnesses
on either side are interested, the court will
propose fresh interrogatories to be exhibited for
examination, as to their interest; (b) and
if they are interested, the court will not permit
them, by whom they were examined, to re-
examine them, upon releases being given. (c)
It seems that it is not allowed, in general, to
bring into competency of witnesses after pub-
(d) But it might be reasonable to allow

the court may order an issue, in order that, upon his examination in a court of law, questions might be put to discover his interest, although it was competent to the court to order an interrogatory to be exhibited to him in the nature of a *voir dire*. (a)

SECTION IV.

Publication.

The parties in a suit having examined their respective witnesses, their depositions are not to be disclosed by any of the persons before whom they were taken, or by their clerks, but are to be closely kept; if taken in town, by the examiners, in their office; if by the commissioners in the country, by the sworn clerk to whom the commission, after its execution, was delivered, until publication passes, (b) whereby liberty is given to the examiners, or clerks in court, to show the depositions openly, and to give out copies of them. But before an office copy of the depositions is delivered out of the office, the examiner, or six clerk, in whose division they are copied, must subscribe his

(a) *Stokes v. M'Kerrall*, 3 Bro. C. C. 228. (b) *Beam. Cha. Ord.* 111.

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to them. (a) Where leave is given, by a court, to exhibit interrogatories to prove a will, or to state, [which is a usual indulgence,] if the party thinks he is not authorised to publish the same, the court will make an order that they be published. (b) If depositions are taken, where no proper stamps can be had, the court will order, as of course, that such of them as were taken on paper, should be engrossed on parchment, and duly stamped; and such of them as were taken on parchment, should be duly stamped. (c)

Publication passes either by rule, by order of

give the other party rules for publication ; first, an ordinary rule, calling on the other party to produce witnesses, and then another rule for a day to show cause why publication should not pass. (a) But where witnesses are examined on both sides under a joint commission, (b) one rule only (viz. the latter one) is sufficient. In these cases, if no good cause is shown to the contrary, publication passes. Either side, who has examined, may give rules. (c) But it seems that the defendant cannot give these rules to pass publication until the plaintiff has been in default one term after the cause is at issue. (d) These rules must be entered in the house book in the six clerk's office, (e) in that division where the cause originally began, and they expire that day sevensnight from the day on which they are entered. They must be entered in term time, and may be so on any day therein ; provided it be done eight days before the expiration of the term ; otherwise they must be entered in the ensuing term. These rules are transcribed from the house book of the six clerk's office into the rule book of the clerk in court, entering the rule ; the latter book is then taken to the register's office to be entered, which is done by the re-

(a) See Ord. Cha. Beam. edit. 190 ; Harr. Cha. Pract. 284 and 285.

(b) Harr. Cha. Pract. 285.

(c) Harr. Cha. Pract. edit. of 1808, p. 285.

(d) *Walmaley v. Elliot*, 1 Dick. 84.

(e) Beam. Cha. Ord. 336.

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etting his initials against the rule in the
of the book. The clerk in court entering
e, gives a note in writing to the adverse
court of such rule being entered. (a) And
any of the depositions are taken by the
er, a copy of the rule to pass publication
be served on him or his deputy.

proper here to remind the reader, that, by
a of the General Orders of 1828, where the
sion for the examination of witnesses is
ble on or before the first return of the
g term, there the plaintiff shall give his
o produce witnesses and pass the publi-

amined such witnesses as they think proper, and being ready to go to hearing, the clerks in court, on both sides, consent that publication should pass; which is done by such consent being signified in one of the rule books in the six clerk's office, upon which publication immediately passes. (a)

The applications to enlarge the time for publication, are usually made in order to afford to the party an opportunity of examining witnesses, who has hitherto examined no witnesses; or, having examined some witnesses, wishes to examine more: The court would, before the Orders of 1828, grant an order to enlarge publication, *as of course*, where no witnesses had been examined; (b) but if witnesses had been examined, and publication had actually passed, an affidavit must be made by the party, his clerk in court, and solicitor, that they have not seen, read, nor been informed of, the contents of the depositions taken in the cause; and that they will not, till publication duly passed; and it seems that a special motion was necessary. (c) But the court will not enlarge publication on the application

- (a) Harr. Cha. Pract. edit. of 1808, p. 285. By an order of the 25th of June, of 1701, publication shall pass by rule only; and no order, unless it be by consent of parties, or by their counsel in open court to the contrary thereof, shall be made. Beames' Ord. Cha. 319.
- (b) French v. Lewry, 6 Mad. 50.
- (c) Harr. Cha. Pract. 288. An instance, however, has occurred where the court

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party who has taken the depositions of the
the party out of the office, although by
e, and notwithstanding the usual affidavit
g knowledge of their contents. (a) The
in making an order to enlarge publica-
before the cause is set down, does it pro-
lly, so as not to hinder the plaintiff from
down his cause. No cause can be set
to be heard at the same term, when pub-
n passes, unless by consent or special or-
Although the publication had been fre-
y enlarged before, and the cause was of five
standing, where the delay had been ac-

counted for, by affidavit, and the inquiries to be pursued, were likely to further the ends of justice, publication has been further enlarged ; (a) and the same has been done upon notice, where witnesses had been examined, and publication once before enlarged. (b) But the party's want of knowledge of the rules of proceeding, and want of attention in his solicitor, are not sufficient. (c) And where a defendant obtained leave to enlarge publication, and neglected to examine witnesses within the enlarged time, and after publication had passed, obtained, irregularly, an order, as of course, to enlarge publication, and apprised of that irregularity, examined witnesses, an application, that publication might be further enlarged, or the evidence taken under the informal order read at the hearing, was dismissed with costs. (d)

The court would likewise enlarge publication, as of course, at the instance either of the defendant or plaintiff, although the cause has been set down, and although so done by the party who makes the application, (e) where it stood so far

(a) *Barnes v. Abram*, 3 Mad. 103.

(b) *Moody v. Leming*, 1 Mad. 85.

(c) *Whitelock v. Baker*, 13 Ves. 512.

(d) *Conethard v. Hasted*, 3 Mad. 429.

(e) *Yate v. Bolland*, 2 Dick. 495.

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the paper of causes, that there was no
lity whatever, that the cause in question
in its turn, be heard before the enlarged
r publication expired. In all applications
rge publication, the court always restricts
e to a given period, within which the cause
likely to come on; therefore, the party ap-
should always state how far in the paper
es the cause in question stands.

an application to enlarge publication is
no case of course; for, by the 18th of the
l Orders of 1828, publication shall not be
ed, except upon special application to the

tion; as this would tend to multiply causes, and make them endless. (a)

There are other purposes likewise, for which the court will be induced to enlarge publication, as in the case of a cross bill filed before the original suit has been proceeded in; and the defendant to the cross suit, who is plaintiff to the original suit, is in contempt for not putting in an answer to the cross bill. The plaintiff in that suit may, of course, (b) have publication in the original suit enlarged for a fortnight, after the answer to his cross bill is come in, as the discovery afforded by such answer may be of service to him in pending his interrogatories. (c) But if the cross bill was filed after the original cause was proceeded in, [as if answer had been put in to the original bill, (d)] it is by no means of course to enlarge publication; but the application for it should be a special motion, with notice; as, otherwise, the hearing of the original cause might be often vexatiously delayed. (e) If the delay, in not filing the cross bill before, can satisfactorily be accounted

(a) *Smith v. Turner*, 3 P. W. 412.

(c) *Ramkissenseat v. Barker*, 1 Atk. 20.

(b) But see the 18th of the General Orders of 1828, which directs generally, that publication shall not be enlarged, except upon *special* application.

(d) *Dalton v. Carr*, 16 Ves. 93.

(e) *Aylet v. Easy*, 2 Ves. 336.

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court will be induced, unless great inconvenience may be the result to the other party, to the application ; but in a case where the bill was not filed until rules given for passing judgment, and the original cause set down for trial, the application was refused, with costs. (a)

It may be here useful to remark, that evidence in a cross cause, concerning the matters in issue in the original cause, is not allowed to be read after judgment in the latter cause ; for if the plaintiff, in the cross cause, could not have examined all his witnesses in the original cause, he should have applied to have enlarged publication in that cause ;

If a witness has been examined *de bene esse* under the circumstances before stated, either with the view of using his testimony in a cause in this court, or at law, and he dies, or is not returned from beyond sea, before he would have been examined at the regular time for the examination of witnesses, or is gone to a great distance beyond sea, so that it is impossible to have a subsequent examination of him in chief in the former case, (a) or before the trial at law in the latter case, (b) upon a proper proof of the fact by affidavit, an order may be obtained upon notice for publishing his deposition. (c) But where a witness was examined *de bene esse*, in going to the West Indies, and before publication passed, he was in Ireland, publication was refused, and it was held that he must be examined in chief. (d) But where there is a moral impossibility to have that examination in chief, the court will permit the depositions *de bene esse* to be published; as, where the witness was resident in Sweden, and the king of that country refused to permit the execution of the commission, requiring the examination to be by some magistrates there, according to the laws of Sweden, and

(a) Gason v. Wordsworth, 2 Ves. 336. Webster v. Pawson, 2 Dick. 540.

(b) Webster v. Pawson, 2 Dick. 540. (d) Birt v. White, 2 Dick. 473.

(c) Gilb. For. Rom. 141.

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mission was thereupon returned, the court
that depositions taken *de bene esse* be
d. (a) Depositions of this description
en allowed to be published, in order to
at a trial at law, the witness being unable
l. (b) Where it was probable that a wit-
no had been examined *de bene esse*, would
le to attend the trial, on account of a
injury, the court ordered the officer, in
custody the original deposition was, to
with it at the trial, in order to tender
final deposition to be read in the court of
t should be satisfactorily proved that the
was unable to attend. (c)

standing a considerable length of time has elapsed after the examination of such witness before the plaintiff had filed his replication, as the defendant might have dismissed the bill for want of prosecution. (a) After a witness has been examined in chief, the court will not order his former depositions taken *de bene esse* to be published, in order to compare them with his depositions taken in his examination in chief. (b)

When these depositions are offered to be read, they are open to the same objection, on the ground of credit or competency, as the evidence of a witness examined in chief; the order for the examination of a witness *de bene esse*, containing a clause, that it should be without prejudice to any exception that could be made to the witness in question. But though depositions taken *de bene esse*, are irregular, yet at the hearing of the cause, it is too late to make the objection for irregularity; in such case, you ought to have moved to discharge the order for publication. (c)

The publication of depositions in *perpetuam rei memoriam*, are not to be published till after the

(a) *Duke Hamilton v. Meynal*, 2 Dick. 788. *Anonymous*, 2 Ves. 496.

(b) *Cann v. Cann*, 1 P. W. 566.

(c) *Dean and Chapter of Ely v. Warren*, 2 Atk. 189.

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the witness, (a) except, perhaps, where he
confirm to travel. (b) The court will not
copies of depositions taken to perpetuate the
ny of witnesses, to be delivered out, for the
of perfecting the title to an estate, even
he witnesses are dead. (c) As the only
of a suit of this sort, is to preserve and
the testimony of witnesses examined, it
with the publication of the depositions.

Abergavenny v. Pow-
434. Harris v. Cot-
er. 678. Morrison v.
Ves. 670.

(b) Morrison v. Arnold, 19
Ves. 670 and 672.

(c) Teale v. Teale, 1 Sim.
and Stu. 385.

CHAPTER VIII.

PROCEEDINGS PREPARATORY TO, AND AT, THE
HEARING.

Setting down Cause for Hearing; Subpœna to hear Judgment, and Hearing; and Decree.

SECTION I.

Setting down Cause for Hearing.

IF the plaintiff can safely proceed to a hearing of his cause upon bill and answer, he may set his cause down for hearing, upon the coming in of the answer on the days appointed for setting down causes. If the answer has been replied to, and a rule to pass publication given, the plaintiff may set down his cause for the term next ensuing after publication; but not the same term publication passes, unless by special order or consent. (a)

(a) Beam. Cha. Ord. 319 and 333. Lord v. Genslin, 5 Mad. 83.

Setting down Cause for Hearing.

may be regularly set down without con-
the vacation, after the term in which
ion passes. (a)

ause may be set down before publication
ed, if publication has been enlarged at
ance of the *defendant*, upon the terms of
ering the plaintiff from setting down his
) But when a *plaintiff* had enlarged
on, and, before the time for publication
ired, set down the cause for hearing, and
subpæna to hear judgment, the *subpæna*
on motion, quashed, and the cause struck
he paper with costs. (c) If the plaintiff

set down in the Lord Chancellor's paper of causes, are now heard before the Vice Chancellor, unless the Lord Chancellor makes an order that any particular cause shall be heard by him.

The six clerks claim a privilege of setting down, previous to each term, a certain number of causes for hearing before the Lord Chancellor, or the Master of the Rolls. They usually give their clerks notice, when this is to be done, which is about the time of the third seal after Hilary, Trinity, and Michaelmas term; and in the Easter vacation, the day before the seal preceding Trinity term. The clerk in court, being instructed by his solicitor to bring his cause to a hearing, leaves with the six clerk of his division a short note in writing, containing the title of the cause, and the object of the suit, and also that a rule to pass publication has been regularly entered and expired; or, if the cause is heard upon bill and answer only, he adds those words, instead of a rule to pass publication. The six clerk will hereupon set down the cause. But as the six clerks are limited as to the number of causes they have the privilege of setting down, when that number is complete, the cause is set down with the register, by the solicitor, who must obtain from his clerk in court, the six clerk's certificate, that the proceedings have been regularly filed; (a) and

(a) Beam. Cha. Ord. 135, 267.

Setting down Cause for Hearing.

sses have been examined, or rules to pass
ion given, a certificate of the latter must
ise procured and produced to the register,
will then enter the cause in the cause book,
l give a note of the same having been
e) If the registers have set down their
number, the cause must be set down with
d Chancellor's secretary. Previous to the
83, it was the practice to present petitions
own causes with the secretary, on which
were made ; from that period, the practice
ioning was discontinued, and the cause is
down, on production of the usual certifi-
the pleadings being filed, or publication
to the secretary without any order or to

from hearing that time, and shall not come on again till further order.

A book of causes, to be heard before the Lord Chancellor, or the Master of the Rolls, is kept at the register's office, and is open to the inspection of solicitors at the office hours. By the 38th of the General Orders of 1828, where any cause, which is set down to be heard, either in the court of the Lord Chancellor, or in the court of the Master of the Rolls, shall be afterwards set down to be heard in the other of the said two courts; there the solicitor for the plaintiff shall certify the fact to the register of the court, where the cause was first set down, who shall cause an entry thereof to be made in his book of causes, opposite to the name of such cause; and the solicitor for the plaintiff shall be allowed a fee of six shillings and eightpence for so certifying the fact, if he shall certify the same within eight days after the said cause is so set down a second time. And by the 39th of the same Orders, where any cause shall become abated, or shall be compromised, after the same is set down to be heard in either of the said two courts, the solicitor for the plaintiff shall also certify the fact, as the case may be, to the register of the court where the cause is so set down, who shall in like manner cause an entry thereof to be made in his cause book; and the solicitor for the plaintiff shall be allowed the same fee of six shillings and eightpence for such certi-

subpæna to hear Judgment, and Hearing.

if he shall certify the fact as soon as the
all come to his knowledge.

proper here to remark, that there is, be-
causes in the general paper, a paper of con-
causes and of short causes; the former are
here the decree is of course, and consented
the other side, the defendant submitting to
without the service of a *subpæna* to hear
nt. These consent causes are heard before
ter of the Rolls, generally in the morning,
o'clock, on appointed days for that purpose.
causes are those in which the decree is either
e, or involves very little difficulty. There

Subpœna to Hear Judgment, and Hearing. 481.

time was this: if a retainer was sent by a party against whom the counsel had been employed, the retainer being in a cause between the same parties, the counsel, before accepting it, sent to his former client, stating the circumstance, and giving him the option; that this course has been relaxed; and the course now is, as it has been represented at the bar. (a) His Lordship did not admit that a counsel is bound to accept the new brief. His Lordship's opinion was, that he ought not, if he knows any thing that may be prejudicial to the former client, to accept the new brief, though that client refused to retain him.

SECTION II.

Subpœna to Hear Judgment, and Hearing.

The cause being set down for hearing, and a note in writing thereof having been obtained from the register, (b) a process, called a *subpœna* to hear judgment, is then sued out (unless it is a consent cause), for which purpose, the register's

(a) The course represented at the bar was this, <i>i. e.</i> if a counsel having advised upon pleadings and evidence, not being retained, the next day receives a retainer	on the other side, there was no practice requiring notice to be given of that. 19 Ves. 268. (b) Beam. Cha. Ord. 46, 47, 50, 103, 104.
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Subpæna to Hear Judgment.

to be annexed to the *præcipe* for the *subpæna* and both are left at the *subpæna* office, when *subpæna* is bespoken. The body of this writ commands the party to appear in Chancery on a certain day, in the common form. But the indorsement, and the label, the object of which is stated to be to hear judgment. This writ is returnable three days before the day for which the cause is set down to be heard, unless the return day happen on a Sunday, in which case one day more is allowed; but the indorsement of the writ shows the day on which the cause is appointed to be heard. It is likewise to be observed, that if there are not three days in term ending the day on which the cause is appointed

should be good service; and if the clerk in court cannot be found, or any one attending at his office, the court will direct that service on the solicitor be sufficient, a copy of the order being left at the last place of the party's abode. (a) Service of this process on an infant defendant was not good; it ought to be served on his guardian *ad litem*. (b) If the plaintiff seeks satisfaction out of the separate estate of the wife, she must have been served personally with the *subpœna* to hear judgment. (c) But now, by the 20th of the General Orders of 1828, service on the clerk in court of any *subpœna* to hear judgment, shall be deemed good service.

An irregularity of *subpœna*, as if in it the plaintiff's name is spelt wrong, is waived by the defendant, if he appears on a motion to advance the cause, and does not then take the objection. (d)

The time of service of this process is regulated by the residence of the adverse party; if he lives above twenty miles from London, it must be served fourteen days, exclusive, before the day to hear judgment, except in the short vacation between Easter and Trinity terms, when ten days

(a) Anonymous, 2 Ves. 23.

(c) Jones v. Harris, 9 Ves.

(b) Freeman v. Carnock, 2 486.

Dick. 439.

(d) Carvick v. Young, Jacob,

524.

Subpœna to Hear Judgment.

sufficient ; (a) but if within twenty miles
don, if it be served ten days before the day
judgment, it is generally sufficient ; and
me notice is requisite in the short vaca-
(b)

Subpœna to hear judgment is necessary,
gh a cause is set down under an order, on a
tory undertaking, to speed the cause. (c)
a plaintiff, under a peremptory undertaking
ed his cause, obtains an order to withdraw
lication, and amend his bill, which is after-
discharged, but leave is given him to set
his cause on bill and answer ; this dispenses
e necessity of service of *subpœna* to hear

a cause is set down, and a *subpœna* to hear judgment is served, and afterwards a bill of revivor is filed, no new *subpœna* is necessary to hear judgment. (a)

This process to hear judgment is sued out by the party who sets down the cause, and he ought to be ready, when the cause is called on, with an affidavit of service on the adverse party, for the reasons which will be after mentioned. If there are two defendants in a cause, and one of them sets down the cause, it is only necessary for him to serve the plaintiff with this *subpœna*, and it is the duty of the plaintiff to serve the other defendant with this writ. (b)

The above steps having been taken, the cause is, in its turn, put down in the paper of causes to be heard. For the register makes out, from the cause book, a paper of causes, generally twelve; but at the Rolls, in the interval between the end of the term and the first seal, usually more, taking them in rotation as they stand in that book; and this is done the day previous to the hearing of these causes. One copy of this paper is fixed up in the register's office, and another is put up in the six clerks' office. The cause is then called on

(a) *Bray v. Woodran*, 6 Mad.
72.

(b) *Clarke v. Dunn*, 5 Mad.
474; *Smith v. Wells*, 6 Mad.
193.

Hearing.

t, as it stands in this paper; upon which readings on each side are opened shortly to start, by the junior counsel, for the plaintiff defendant; and, after which, the plaintiff's counsel states the plaintiff's case, and the issue, and submits to the court his argument upon them. Then copies of the deposition of the plaintiff's witnesses, and such parts of the defendant's answer as support the plaintiff's case are read by one of the six clerks in West-Hall; or by the plaintiff's solicitor, or in court, in Lincoln's-Inn Hall, and at the end of which the rest of the counsel for the defendant address the court; then the same course

hearing of any cause or matter, and it shall appear to the Master to have been necessary, or proper, for such party or parties to retain two counsel to appear, the costs occasioned thereby shall be allowed, although both of such counsel may have been selected from the outer bar.

If there is an objection in the pleadings, for want of proper parties, the regular time for making it, is after the pleadings have been opened, and before the merits are disclosed. (a) However, this objection may be made after the cause has been gone into, and even thoroughly heard; (b) and if the objection is allowed, the court permits the cause to stand over, on paying the costs of the day, that the plaintiff may have an opportunity of making proper parties; (c) although there have been instances where the bill has been *dismissed* for want of parties, with costs. (d) And they only are parties defendants, against whom process is prayed. (e) But it is proper to observe, that if a cause comes on again, after it has been put off by the court, only for want of formal parties, in order that the decree might be complete, an objection, for want of parties, which might have been made

(a) *Jones v. Jones*, 3 Atk. London, 1 Stra. 95; Gilb. For
110. Rom. 159.

(b) *Ibid.*

(e) *Fawkes v. Pratt*, 1 P. W.

(c) *Anonymous*, 2 Atk. 14. 592.

(d) See *Stafford v. City of*

Hearing.

first instance, comes too late, when the case is again heard. (a) And, by the 34th of the General Orders of 1828, when a cause, which has been ordered for hearing, is called on to be heard, but is not heard, or is decided by reason of a want of parties, or defect, on the part of the plaintiff, and is afterwards struck out of the paper, if the same is again set down, the defendant or defendants shall be allowed the taxed costs occasioned by the first setting down, although he or they do not obtain the costs of the suit. And, by the 35th of the General Orders of 1828, where a cause, which has been ordered for hearing, is ordered to be adjourned, upon payment of the costs of the day,

or any of the parties, such costs as the court shall think fit to award.

But it may happen, that either plaintiff or defendant does not appear at the day of hearing. If the defendant does not appear, the plaintiff, on producing an affidavit of service of *subpæna* to hear judgment, either on the defendant, or on himself, by the defendant, (supposing the defendant to have set down the cause and served the *subpæna*,) will be entitled to a decree *nisi* against the defendant. But a word in the defendant's answer must be read, to show that there was a *lis contestata* in the cause. But reading the title of the answer, and the formal words in the beginning of it, is sufficient. (a) The plaintiff's solicitor ought to take care to have an office copy of the answer signed by the six clerk; for, unless it be so signed, it cannot be read. (b)

In a decree against a defendant, who makes a default at the hearing, there is always a reservation that he shall be at liberty to show cause against it, at the return of the *subpæna* served upon him. (c) If, however, the defendant appears at the

(a) Note. By 65th of Lord Bacon's Ord., Beam. Cha. Ord. 29, where no counsel appears for the defendant at the hearing, and the process appears to have been served, the answer of such defendant is to be read in court; see Beam. Cha. Ord. 198.

(b) Gilb. For. Rom. 151, 154, 155.

(c) Beam. Cha. Ord. 198.

Hearing.

, and the cause goes off till a further day, then makes default, an absolute decree pronounced against him; (a) but if the does not appear on the day for showing this will be considered as giving up the nt, and the bill will be dismissed. (b) The , in default of the defendant's appearance, ed to draw up such a decree against the nt as he can abide by; but the evidence, s not to be entered as read. (c)

the decree has been passed and entered in al manner, the plaintiff sues out, and serves defendant, a *subpæna*, to show cause against ree (and service on one of his family will be

cause against the decree, a petition should be presented to the judge who heard the cause, praying that, upon payment of the costs incurred by his default, in not attending the hearing, the cause may be restored to the paper of causes, and that it may be set down on some particular day immediately. It would be improper to pray, that the cause should be set down again after all the causes already set down for hearing; as this would be encouragement to a defendant to make default at the hearing, in order to obtain delay. (a) The above order will be granted of course; and the register will accordingly set down the cause to be heard, on the day appointed for hearing thereof, upon the production of such order; and also of a certificate or receipt, from the adverse clerk in court, of the payment of taxed costs, or of an affidavit filed of a tender and refusal of them; (b) but without such certificate or affidavit, the register will not set down the cause. But if the defendant submits to the decree, the plaintiff may obtain as of course, upon affidavit of service of the *subpœna* to show cause, and upon certificate from the register, that no cause is shown, an order for making the decree absolute. (c) Before any petition for a rehearing can be presented, the decree must

(a) *Margravine of Anspach v. Noel*, 19 Ves. 573.

(c) *Harr. Cha. Pract.* 1808, p. 310 and 311; *Hind*, 437

(b) *Beam. Cha. Ord.* 198 and 315.

Hearing.

le absolute against the defendant. (a) If a default has been made absolute, the proper way to set it aside is, by presenting a petition to the court, not by motion to discharge the order making the decree absolute. (b)

If the plaintiff does not appear at the hearing, an affidavit being made either that the defendant was served with a *subpœna* to hear judgment, stating that the cause was set down by the court, and the *subpœna* sued out by him,) or that the plaintiff was served with such *subpœna*, stating that it was sued out by the defendant) the case will be dismissed, with costs. But without proof of service of the *subpœna* to hear judgment,

struck out of the paper, and no costs are given on either side. The plaintiff may, by petition, have his cause restored to the paper of causes; but it is postponed, till after all the causes, which are then set down, are heard.(a) But the last cause in the paper is exempt from these rules; if it is called on, and either of the parties does not attend, it stands over, of course, till the next day of causes, without any prejudice to the absent party.

It frequently happens, that a party in a cause is not ready, when it is called on, and applies to the court that it may stand over till a stated day; and this application is usually consented to by the other party, if no material inconvenience can arise from the delay; but if it is not consented to, the party, who makes the application, ought to pay the costs of the day.

Although it is a general rule, that causes come on to be heard according as they stand in the cause book, yet they are sometimes heard out of their ordinary course.(b) In some cases, a cause

(a) *Gilb. For. Rom.* 162.

(b) Note. It seems formerly to have been the practice, if a peer of the realm was a party in a cause, and came on the bench, to call on his cause, next after that then in hearing when

the peer took his seat on the bench. But this was not allowed, if the adverse counsel would say that they were not ready, but would be so when the cause was called on in its course; *Gib. For. Rom.* 154.

Hearing

own for hearing, will be advanced on an application by motion, or petition, to the judge before whom the cause stands for hearing. Thus, if it is for the performance of an agreement on the part of the defendant, to accept a lease for a term of years, if it appears that the term of years will expire before it can come on to be heard in its proper course, (in which case the decree which was made could not be made against the defendant,) the court will advance the cause on the plaintiff's application, making to give due notice to the defendant of the day advanced; and no previous notice of the day is necessary to the other side, as a defendant has no right to object to the cause being advanced at any time after it has been set down for hearing.

having been previously obtained.(a) But office copies of depositions, by living persons, in a tithe suit in the Exchequer, may be read in a similar suit in this court, against another defendant, who makes the same defence, on production of office copies of the bill and answer in the former suit, without any order of this court for that purpose.(b) The other side may make use of the usual order obtained in a suit here, without motion, unless he is, upon special reason shown to the court by the party first desiring the same, inhibited by the same order from so doing.(c) And it may be added, that the court will order depositions in the cross suit to be read, on the account directed in the original suit, though the cross bill is dismissed.(d) And a cross bill for discovery, taken *pro confesso*, will be ordered, on motion, to be read at the hearing of the original cause.(e) But it is necessary that a *subpœna* to hear judgment should be served in each cause; for the cause of that party, who

(a) *Nevil v. Johnson*, 2 Vern. 447; *Wilford v. Beaseley*, 3 Atk. 501 and 503; *Wy. Pract. Reg.* 172.

(b) *Williams v. Broadheard*, 1 Sim. 151. *Nota.* By 71st of Lord Bacon's Ord., Beam. Cha. Ord. 31, decrees in other courts may be read upon hearing, without the warrant of any special order; but no depositions taken in any other court,

are to be read but by special order; and, regularly, the court granteth no order for reading depositions, except it be between the same parties, and upon the same title and cause of suit.

(c) *Beam. Cha. Ord.* 194.

(d) *Lubiere v. Genou*, 2 Ves. 579.

(e) *Corey v. Gerteken*, 2 Mad. 43.

Hearing.

serving this process shall not come on at the same time with the other party's, unless the latter consents to it. (a)

If the cause is likely to come on before the time which the publication has been enlarged, application must be made, that the cause be put off and over or be adjourned; it would otherwise be struck out of the paper, and be set down as dismissed. (b) It may be proper here to state, that, according to the 13th of Lord Bacon's Orders, (c) it is directed that where causes are dismissed upon full answer, and the dismissal signed by the Lord Chancellor, such causes shall not be retained in the paper, nor new bill admitted, except it be upon

SECTION III.

Decree.

A decree is a sentence of the court at the hearing, upon facts proved or admitted. After it has been pronounced by the court, the minutes, or heads of it, are taken down by the register in court, and delivered out to the different parties in the cause. To assist the register, the counsel or solicitor for each party frequently takes down the minutes of the decree, according to his apprehension of it, and which are left with the register. (a) If any part of the decree is mistaken, omitted, or obscurely expressed in the minutes, the court will, upon motion or petition, before the decree has been passed and entered, rectify the minutes, by making them conformable to the decree. From the minutes, as taken by the register, or as agreed upon by the opposite parties, the decree is drawn up by that officer, and is delivered out to the

(a) Note. By 40th of Lord Bacon's Orders, Beam. Cha. Ord. 21, the registers, upon sending their draught unto the counsel of the parties, are not to respect the interlineations or alterations of the said counsel, be the said counsel never so great, further than to put them in remembrance of that which is truly delivered in court, and so to conceive the order upon their oath and duty, without any further respect.

Decree.

in whose favour it is made, and a copy of it
ally bespoken by the other party. (a) This
e is afterwards returned, and an office copy
of it by the adverse party. The register
ppoints a day for passing the decree, which he
y sending a note in writing to the adverse
s clerk in court, informing him that the
e will be passed on such a day, and requiring
o bring his copy, and to attend at the passing,
t he will pass the decree without him; the
er then passes the decree, unless some mis-
or error can be pointed out in the mode of
ng it up. The register passes the decree by
g his signature on the left-hand side of the

copy of it is entered of course in the books kept for that purpose.

Where there is evidence in the cause, so much of it as has been read, or agreed to be considered as read, is entered in the decree *as read* at the hearing; and where it does not appear by the register's minutes, that any evidence was read at the hearing, the court ought not, upon a subsequent application, to make an order that the evidence should be entered as read. (a) But in a decree by default, it is not the practice to enter the evidence as read. (b) The decree is then said to be passed and entered. (c)

All decrees and orders made in Michaelmas and Hilary terms, are to be entered before the first day of Michaelmas term following, and all of Easter and Trinity terms to be entered before the first day of Easter term, or else the parties must obtain an order to enter these *nunc pro tunc*. (d)

It may be useful to remark, that if the party in possession of the decree neglects to return it to the register to be passed, so that a copy of it cannot be delivered out to the other party, or to enter it after it has passed, in the one case, the

(a) 1 Bro. P. C. 466.

(c) Hind, 430, 431; Gilb.

(b) Stubbs v. ———, 10 For. Rom. 162.

Ves. 30.

(d) Gilb. For. Rom. 163.

Decree.

will, upon application of the latter, order the to be returned to the register ; in the other the register will, on application to him, sign a true copy of the original decree, which copy shall then be entered in like manner as the original.
(a)

In the case of the loss of a decree, which had been drawn up and acted under, and on which proceedings had been had in the Master's office, and reports made, and which had not been entered after a lapse of 80 years, has been supplied by an order, directing an entry of the decree to be made, from the original writing, purporting to be the copy of

It is foreign to the nature of this work to point out the different persons who are bound by, or who may take advantage of, the decree which is pronounced by the court. But it may be useful to observe, that regularly, if any thing is prayed against an infant, by the words of the decree he has a day given him to show cause, within a certain time after he comes of age ; the words of which decree are thus: “ And this decree is to be binding on the infant, unless he shall, within six months after he shall have attained the age of twenty-one years, being served with process for that purpose, show unto this court good cause to the contrary.” This process, which is by way of *subpœna*, must be served on the defendant at his coming of age ; and it is a judicial writ, and must be returnable in term time ; but if he shows no cause, the decree is made absolute upon him. (a) On the infant’s coming of age, and before the decree is made absolute, he may put in a new answer, and make another defence, and examine witnesses. (b) And it is good cause, why a decree should not be made absolute against an infant, after he comes of age, that he has put in a new answer. (c) But an infant who is aggrieved by a decree, is not obliged

(a) Gilb. For. Rom. 160. 2 P. W. 401 ; Bennett v. Lee,

(b) Fountain v. Caine, 1 P. 2 Atk. 531.

W. 504 ; Napier v. Effingham, (c) Napier v. Lady E. Howard, Mos. 68.

Decree.

y, till he is of age before he seeks redress, may apply for that purpose, as soon as he is of age; neither is he bound to proceed by way of appeal, or bill of review, but may impeach the former decree by an original bill; in which it is sufficient for him to say, the decree was obtained by fraud and collusion, or that no day was given him to show cause against it; (a) and it is provided that, provided that there is a foundation upon the merits, an infant, before he comes of age, is entitled to apply to the court to put in a defence in answer. (b) But in the case of a decree of foreclosure against an infant, although he has six years' time, after he comes of age, to show cause against the decree, yet he is not, when he comes

vised to trustees for sale to pay debts, and the heir at law is an infant, he has no day given him to show cause on coming of age; but if he had been decreed to join the conveyance, he must have had a day, after the coming of age. (a) Where there is no devise of lands expressly to any particular person, he has a day on coming of age. (b)

In the case of a *feme covert*, where a bill is brought against her and her husband, during coverture, and where he merely claims in her right, and dies, and the right survives to her, it seems that the wife may file a new answer, and make a new defence, and draw into question the validity of the decree obtained against her during coverture, and reverse it, if there be just cause for it. (c) But if she, before her marriage, or her ancestors, mortgage lands, and the equity of redemption comes to her, upon a bill brought by the mortgagee to foreclose, the married woman is liable to be absolutely foreclosed, though during coverture, and shall have no day given her, or her heirs, to redeem, after the coverture shall be determined. (d)

(a) *Cooke v. Parsons*, 2 Vern. 420; *Avedale v. Avedale*, 3
429; *Blatch v. Wieder*, 1 Atk. 421. Atk. 117.

(c) *Gilb. For. Rom.* 161.

(b) *Blatch v. Wieder*, 1 Atk.

(d) *Mallack v. Galton*, 3 P.
W. 352.

Decree.

in respect to the persons, who may have the benefit of a decree, it may be proper to observe, that a party to a suit may sometimes have the benefit of a decree, without appearing at the hearing; as where a decree, in a suit by a residuary legatee against the trustees and executors, and other residuary legatees, who were out of the jurisdiction of the court, directed the usual costs, the court ordered, upon the application of the last-named persons, though still abroad (submitting to be bound by the decree), that they should be at liberty to enter their appearance, and should have the same benefit of the decree, as if they had put in their answer, and had appeared at the hearing. (a) And in another case, a bill

in the cause, and to be liable to the costs, he should be at liberty to go before the Master, and act upon the decree, as if he had been named a party upon the record. (a) And the court will sometimes order that the plaintiff in one suit shall be at liberty to prosecute a decree obtained in another, but similar, suit, if the plaintiff in the latter delay prosecuting the decree. (b) Also, in a creditor's bill, if, after a decree is obtained, the plaintiff dies, another creditor may obtain an order for liberty to file a supplemental bill, if the representatives of the deceased plaintiff do not revive within a limited time. (c) And a creditor, coming in under a decree, is permitted to prosecute the same, on account of delay, though only interested in the first part of the decree, and not in the whole of it, as the plaintiff was. (d) And by the 56th of the General Orders of 1829, where the party actually prosecuting a decree or order does not proceed before the Master with due diligence, there the Master shall be at liberty, upon the application of any other party interested, either as a party to the suit, or as one who has come in and established

(a) *Farrer v. Wyatt*, 5 Mad. 449.

(b) *Torin v. Fawke*, 1 Dick. 235; *Sheppard v. Messider*, 2 Dick. 797; *Sims v. Ridge*, 3 Mer. 458.

(c) *Dixon v. Wyatt*, 4 Mad. 392.

(d) *Edmunds v. Acland*, 5 Mad. 31. See *Powell v. Walworth*, 2 Mad. 183; *Fleming v. Prior*, 5 Mad. 423; *Sims v. Ridge*, 3 Mer. 458.

Decree.

him before the Master, under the decree or to commit to him the prosecution of the decree or order, and from thenceforth, neither party making default, nor his solicitor, shall be at liberty to attend the Master, as the prosecutor of the said decree or order. And in a creditor's suit, residuary legatees, upon motion, obtain an order that they should be at liberty to attend the Master, in taking the accounts, although they were not parties. (a) And leave is given, upon petition, to the purchaser of the interest of a party, to attend the Master in making the enquiry directed by the decree. (b) In a decree for the administration of assets, in a creditor's suit, a creditor having filed a bill,

defendant to prosecute the decree against the other ; as where the surety pays money, the principal must indemnify the surety, and the court will make the decree over. (a) And on this subject it may not be irrelevant to state, that where the claim of the next of kin is raised on the record, and one of the next of kin had in that character been made a party to the suit, then any other persons found by the Master to be the next of kin may be heard by counsel, though not parties ; but where the claim is not raised on the record, and none of the next of kin are in that character parties in the cause, there must be a supplemental bill to bring them before the court. (b)

(a) *Walker v. Preswick*, 2 Ves. 622.

(b) *Waite v. Temple*, 1 Sim., and Stu. 320.

CHAPTER IX.

PROCEEDINGS UNDER INTERLOCUTORY DECREES.

Mode of Proceeding in the Master's Office, under such Decrees; Sales before the Master; The Master's Report, Exceptions thereto; Issue, and Special Case; Further Proceedings; Costs.

SECTION I.

it being frequently necessary to have an account taken, and inquiries made, and points ascertained, by a Master, or to direct a question of fact to be tried by a jury, or to send a cause for the opinion of a court of common law on a pure question of law, before this court can with propriety consider the question submitted to it; and when these previous matters are settled, the cause is afterwards brought on for further directions, or upon the equity reserved, there being, in the original decree, a reservation of the points thereafter intended to be considered. If, upon a reference to a Master, any fact is admitted or agreed to before him, he shall make a memorandum of the same, which must be signed by the party admitting or agreeing, in the presence of the Master. (a)

It would be almost impossible to state all the different purposes for which references (b) are

and upon the entrance into a hearing, they may receive some direction, and be turned over to have the accounts considered, except both parties, before a hearing, do consent to a reference of the examination of the accounts, to make it more ready for a hearing. By the 51st Order, the like course is to be taken for the examination of

court rolls, upon customs and copies, which shall not be referred to any one Master, but two Masters, at the least. See Beam. Cha. Ord. 80 and 81.

(a) Beam. Cha. Ord. 304.

(b) Note. By the 22nd of Lord Coventry's Orders, Beam. Cha. Ord. 81, the register shall, within ten days after the end of every term, certify to the Lord

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to the Master under a decree; the cases in which these references are made, are generally those in which the investigation or inquiry into the facts of the matter is necessary, but which it would be extremely difficult or inconvenient, for a judge to make in a court of justice, to make. Thus (as a general rule) it is referred to a Master to take the accounts; to examine the parties or witnesses upon interrogatories; to advertise for the sale of creditors under a creditor's bill; to allow maintenance for an infant; to approve of a proper person to be his guardian; to sell the estates directed by the court to be sold; to determine whether the vendor has a good title in a bill for the

By the 76th of the General Orders of 1828, where a Master is directed to settle a conveyance, or to tax costs, in case the parties differ about the same, there the party claiming the costs, or entitled to prepare the conveyance, shall bring the bill of costs, or the draft of the conveyance, into the Master's office, and give notice of his having so done to the other party; and at any time within eight days after such notice, such other party shall have liberty to inspect the same, without fee, and may take a copy thereof if he thinks fit; and at or before the expiration of the eight days, or such further time as the Master shall in his discretion allow, he shall then either agree to pay the costs, or adopt the conveyance, as the case may be, or signify his intention to dispute the same; and in case he dispute the same, the Master shall then proceed to tax the costs, or settle the conveyance according to the practice of the court.

The first step to be taken after the decree has been entered, is to leave a copy of the title, and ordering part of it, with the Master, to whom the cause is referred. Several regulations have been introduced on this subject, by the late Orders in

Vide ante p. 6, where a more copious account is given of the references to Masters.

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ery of 1828. By the 48th Order, where any or order referring any matter to a Master brought into the Master's office within two s after the same decree or order is pro- ed, there any party to the cause, or any party interested in the matter of the refer- shall be at liberty to apply to the court by a or petition, as he may be advised, for the e of expediting the prosecution of the said or order. And by the 49th Order, every shall enter in a book to be kept by him t purpose, the name or title of every cause ter referred to him, and the time when the or order is brought into his office, and the

decree or order, the solicitor bringing in the same, shall take out a warrant appointing a time, which is to be settled by the Master, for the purpose of the Master taking into consideration the matter of the said decree or order, and shall serve the same upon the clerks in court of the respective parties, or upon the parties or their solicitors, in cases where they shall have no clerks in court. And by the 51st of the same Orders, at the time so appointed for considering the matter of the said decree or order, the Master shall proceed to regulate, as far as may be, the manner of its execution ; as, for example, to state what parties are entitled to attend future proceedings, to direct the necessary advertisements, and to point out which of the several proceedings may be properly going on *pari passu* ; and as to what particular matters, interrogatories for the examination of the parties, appear to be necessary, and whether the matters requiring evidence, shall be proved by affidavit, or by examination of witnesses ; and in the latter case, if necessary, to issue his certificate for a commission ; and if the Master shall think it expedient so to do, he shall then fix a certain time or certain times, within which the parties are to take any certain proceeding or proceedings before him. And by the 52nd of the same Orders, upon any subsequent attendance before him, in the same cause or matter, the Master, if he thinks it expedient so to do, shall

fix a certain time or certain times, within which the parties are to take any other proceedings or proceeding before him. And by the 53rd of the same Orders, where some or one, but not all, the parties, do attend the Master at an appointed time, whether the same is fixed by the Master personally, or upon a warrant, there the Master shall be at liberty to proceed *ex-parte*, if he thinks it expedient, considering the nature of the case, so to do. And by the 54th of the same Orders, where the Master has proceeded *ex-parte*, such proceeding shall not in any manner be reviewed in the Master's office, unless the Master, upon special application made to him for that purpose, by a party who was absent, shall be satisfied, that he was not guilty of wilful delay or negligence, and then only, upon payment of all costs occasioned by his non-attendance ; such costs to be certified by the Master at the time, and paid by the party or his solicitor, before he shall be permitted to proceed on the warrant to review. And by the 55th of the same Orders, where a proceeding fails, by reason of the non-attendance of any party or parties, and the Master does not think it expedient to proceed *ex-parte*, there the Master shall be at liberty to certify what amount of costs, if any, he thinks it reasonable to be paid to the party or parties attending, by the absent party or parties, or by his or their solicitor or solicitors, or clerk or clerks, in court personally, as the Master in his

discretion shall think fit ; and upon motion or petition, without notice, the court will make order for the payment of such costs accordingly. And by the 59th of the same Orders, every warrant for attendance before the Master, shall be considered as peremptory, and the Master shall be at liberty to continue the attendance beyond the hour, and during such time as he thinks proper ; and shall be empowered to increase the fee for the solicitor's attendance, in proportion to the time actually occupied. And in case the Master shall not be attended by the solicitor, or a competent person on behalf of the solicitor of any party, the Master shall, in such case, disallow the usual fee for the solicitor's attendance, taking care either in allowing an increased fee, or disallowing the usual fee, to mark his determination in his attendance book, and also on the warrant for attendance.

The party whose interest it is to prosecute the decree, (after leaving a copy of the title, and ordering part of it before the Master,) then obtains a warrant from the Master, and serves it on the clerk in court, or his agent at his seat at the six clerks' office, of the party who is directed by the decree to do a specific act before the Master. The warrant must be served two days, at least, before the time required for the attendance thereon, thus : Thursday for Saturday ; Saturday for Tuesday. But if the party is not ready to do

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in question, the Master or the court will, on application for that purpose, grant reasonable time for doing it. But if, after service of the warrant, and the expiration of the time, [if such has been granted,] the party in default, application may be made to the court upon the Master's certificate of such default, and the court may do the act in question within a certain time, or stand committed.

It was necessary that the Master should provide *die in diem*, instead of the usual course, as an order was to be obtained, that the party should be at liberty to do so. But

for an account, there ought to be a distinct interrogatory to the following purport, whether the defendant, the executor, was indebted to the testator, upon any, and what account, and liberty will be given; upon the suggestion of a legatee, to exhibit such an interrogatory. (a) On a reference to the Master, in bankruptcy, with liberty to him to examine parties on interrogatories, if he should think fit, it seems, that if the Master should decline to examine any party, when required so to do, he should state the grounds on which he declined so to do. (b) It is stated by Lord Hardwicke, (c) that where there is a general direction in a decree, to examine a party on interrogatories before the Master, as the Master shall direct, if the *party* has been examined on one set of interrogatories, and afterwards there shall arise *another* matter, which the Master thought it proper to be examined, it is in the judgment of the Master at what time and how often the defendant should be examined; and no new order is necessary, as in the case of a witness. And Sir J. Leach held, if the Master considered further interrogatories necessary, he may admit them, without an order of the court. (d)

(a) *Simons v. Gutteridge*, 13 Ves. 262, 264.

(b) *Ex-parte Charter*, 2 Cox, 168.

(c) *Cowslade v. Cornish*, 2 Ves. 270.

(d) *Price v. Sutton*, 5 Mad. 465. *Cornish v. Acton*, 1 Dick. 149.

But Lord Eldon, in *Purcell v. M'Namara*, (a) said, that though the usual direction is to examine the parties as the Master should think fit, the practice had been settled, that the Master could not, without an order, examine a party who has previously been examined; that it was not of course, but in the discretion of the court to grant or refuse. The Master is at liberty, under the order, to examine all parties on interrogatories or otherwise, as he should think fit, to examine parties *vivâ voce*, after he has examined them on interrogatories, if not satisfied with the former examination. (b)

Interrogatories for the examination of the parties, are settled by the Master, (c) although they are frequently prepared by counsel or solicitor. If the party to be examined resides above twenty miles from London, an order must be obtained for a commission to take his examination, which is granted of course on the Master's certificate that it is necessary. The time for returning the commission is not limited; the Master is the proper judge of that, and the order is made for a commission generally. (d) After a defendant's examination upon interrogatories, the

(a) 17 Ves. 434.

(c) *Purcell v. M'Namara*,

(b) *Ex-parte Sanderson*, 2 17 Ves. 434.
Cox. 196.

(d) *Hairby v. Emmet*, 5
Ves. 683.

court will permit the plaintiff to file new interrogatories, although he moved for payment of money into court upon the first examination. (a) If the party who is to be examined is not in a competent state of mind to put in his examination himself, the court will appoint some person to put in his examination for him. (b) The interrogatories are engrossed on parchment, and the Master signs a certificate of having allowed them, which is filed in the report office. An exception will not lie to the propriety of the interrogatory; but the exceptions should be to the Master's certificate, upon what he does after the interrogatories are addressed to the person to be examined. (c) After the filing of the interrogatories, warrants are then taken out, and served on the clerks in court of the defendant. The party to be examined, then by his solicitor, applies to the Master's office for a copy of the interrogatories, and afterwards prepares a written examination on them, which, although frequently prepared by counsel, need not be signed by him. (d) This rule also applies to the examination of a sequestrator in the Master's office. (e) The examination is then left at the

(a) *Hatch v. ———*, 19 Ves. 116. Griffiths, 1 Dick. 103; sed vide Hughes v. Williams, 6 Ves.

(b) *Page v. Page*, 28th of Nov. 1799; Attorney General v. Waddington, 1 Mad. 321. 459. (d) *Bonus v. Flack*, 18 Ves. 287.

(c) *Paxton v. Douglas*, 16 Ves. 239 and 244; *Lloyd v.* (e) *Keen v. Price*, 1 Sim. and Stu. 98.

Master's office ; if it is taken under a commission it ought to be returned into the six clerks' office ; (a) and the examination is for the benefit, not only of the party who files the interrogatories, but of all other parties interested in it, and who are entitled to take copies of it. (b)

In stating his accounts, if the defendant has set forth, in the schedule to his answer, all his receipts and payments down to the time of filing his answer, he must, in his examination, state only the subsequent receipts and payments, and carry on the account from the foot of his answer, to the time of putting in his examination. (c) If it is conceived, that the examination has not sufficiently answered the interrogatories, an order might have been obtained, that the interrogatories and the examination should be referred to the Master, and that he should look into the examination, and into the interrogatories, and should report, whether the examination be sufficient or not. But now, by the 73rd of the General Orders of 1828, the party complaining that the examination taken in the Master's office is insufficient, may, without any order of reference, examine such matter, and take out a warrant for the Master to examine such matter. If the Master reports the examination is

(a) *Dyott v. Anderton*, 3 Ves. and B. 176. (c) 1 Turn. Cha. Pract. 584.

(b) *Ibid.*

insufficient, the examinant, unless he excepts to the report, must put in a further examination, or he will be committed. And the other party is entitled to a reference to tax the costs in respect of such insufficient examination. (a) But the court will not, in analogy to the case of insufficient answers, upon an examination being reported insufficient, make an order as of course, that the plaintiff should be at liberty to add new interrogatories, and that both sets of interrogatories should be answered at the same time; but a special application must be made for that purpose. (b) On three examinations being reported insufficient, the court will order the party to be committed, as he will be, if no examination at all is put in; but when he puts in his examination, he is entitled to be discharged out of custody, notwithstanding it is objected to as insufficient, for he is not to be kept there till the sufficiency of the examination is ascertained. (c) The examination also of a party, may be referred for impertinence; but if the Master certifies that it is impertinent, he ought to state in what respect he considers the same as impertinent. (d)

It is proper here to add, that if the party is directed by the decree to produce before the

(a) *Hubbard v. Hewlett*, 2 Mad. 469; and see *Gilb. For.* 287.
(c) *Bonus v. Flack*, 18 Ves. Rom. 101.

(d) *Anonymous*, 3 Mad. 246.
(b) *Anonymous*, 3 Atk. 511.

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For all books, papers, &c., relating to a particular matter, in his custody, when he brings them, makes an affidavit that they are all that are in his custody or power, or that he ever had; (a) and by this decree the Master was authorised to require such books to be *left* in his office. (b) And by the 60th of the General Orders of 1828, it is ordered, that where, by any decree or order of Court, books, papers, or writings, are directed to be produced before the Master, for the purpose of such decree or order, it shall be in the discretion of the Master to determine what books, papers, or writings, are to be produced, and when, and for how long, they are to be left in his office, and, in case he shall not deem it necessary that

that there has been a full production, to certify his satisfaction. (a) The mode of correcting the Master's judgment in this particular, seems to be for the person dissatisfied with the Master's opinion to move that he may be at liberty to exhibit fresh interrogatories for the examination of the party. (b) For the Master's certificate, as to the production of books, &c., cannot be excepted to. (c) If the Master should refuse his certificate, on the ground that the party is not compellable, upon the construction of the decree, to make any production, it will be proper to move for an order on the party himself, that he makes the required production; (d) but the court will direct the Master forthwith to make his certificate or report of his approbation of the draft of conveyance, which he was to settle, in order that the party might except to it. (e) If it should be necessary to inspect books and papers left by the defendant, a warrant is taken out and served, under-written, "to inspect books and papers left by defendant." But the Master would not permit an inspection on the first or second warrant thereon, unless the defendant's solicitor attended; if he did not attend, a third warrant was necessary, which should be under-written

(a) *Cotton v. Harvey*, 12 Ves. 391. (d) 1 Turn. Cha. Pract. 348.

(b) *Ibid.* 394.

(e) *Lloyd v. Griffith*, 1

(c) *Jones v. Powel*, 1 Sim. Dick. 103.
387.

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emptory;" and on proof of service of the
ants, the Master would proceed *ex-parte*. (a)

often happens that in order to enable the
ter to make his report, an inspection of the
s of the Bank of England is necessary; and
Bank will permit this to be done, upon the
ter's certificate of the necessity of it; and the
ter, in a proper case, is bound to grant such a
ficate. (b)

suits for an account, the plaintiff prepares
the defendant's answer, schedules, and exa-
tions, and the evidence in the cause, the
ze against him. *i. e.* a statement of the several

To substantiate this discharge, the defendant is not allowed to read his own answer, or examination, unless in this way ; if the answer, or examination, states that, upon a particular day, he received a sum of money, and paid it over, that may discharge him ; but if he says that, upon a particular day, he received a sum of money, and, upon a subsequent day, he paid it over, that cannot be read in his discharge, for it is a different transaction. (a) And by the 61st of the General Orders of 1828, all parties accounting before the Master, shall bring in their accounts in the form of debtor and creditor, and any of the other parties, who shall not be satisfied with the accounts so brought in, shall be at liberty to examine the accounting party upon interrogatories, as the Master shall direct. And by the 62nd of the same Orders, all accounts, when passed and settled by the Master, shall be entered in a book to be kept for that purpose in the Master's office, as is now the practice with respect to receivers' accounts, and with proper indexes, in order to be referred to, as occasion may require. The Master will expect that the accounting party should produce vouchers for his payments above forty shillings, unless the decree directs that he shall be allowed such sums as he swears

(a) *Thompson v. Lambe*, 7 Ves. 587 ; *Ridgeway v. Darwin*, *ibid.* 404.

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as actually expended; in which case, it is not sufficient that he believes he paid them, but he must peremptorily swear to the fact. (a) And in an account against an executor, the Master was directed to allow items, which, if it should be proved by affidavit, were impounded in the Ecclesiastical Court. (b) Where the usual decree in accounts against a personal representative has been taken upon motion, by consent, the Master is not to require the vouchers to be produced, though the answer is not replied to. (c) If the debts are under forty shillings, the defendant may be allowed them upon his own oath; (d) but in this case, also, it is not sufficient that he swears

that purpose, and to consider of a proper person to act as guardian, a state of facts should be laid before the Master, pointing out the situation, age, and fortune of the infant, and the name of some fit person to act as his guardian, what sum of money has been expended, and in what manner, and to and from what period, the maintenance is claimed. If the Master is directed to inquire what real estates the testator died seised of, a state of facts to answer these inquiries must be prepared, and laid before the Master. So, in the case of the marriage of an infant ward of the court, proposals for a settlement by the other party are to be submitted to the Master.

It is proper here to observe, that if a state of facts contains impertinent or scandalous matter, it may be referred to the Master, in the same manner as the pleadings in the cause, or affidavits containing impertinence or scandal. (a) And by the 73rd of the General Orders of 1828, if any party wishes to complain of any matter introduced into any state of facts, affidavit, or other proceedings, before the Master, on the ground that it is scandalous or impertinent, or that any examination taken in the Master's office is insufficient, he shall be at liberty, without any order of reference by the court, to take out a warrant for the Master to examine such matter.

(a) *Erakine v. Garthshore*, 18 Ves. 114.

And the Master shall have authority to expunge any such matter, which he shall find to be scandalous or impertinent.

It often becomes necessary, where particular enquiries are directed by the decree, for the Master to examine *witnesses* ; and it is proper here to premise, that the court is much in the habit of directing enquiries with respect to material points in a cause, in order to supply the defect of proofs in the cause, where a sufficient ground can be shown to satisfy the court of the propriety of such enquiry ; for, although what is sworn by an answer cannot be read in evidence by the defendant, yet the court allows weight to that answer, so far as to take notice of it, as a foundation for an enquiry.(a) Previously to the examination, the party brings in before the Master a state of facts, upon which the examination is to proceed ; but it seems that, if the other party permits his adversary to proceed in examining, without objecting that he had not brought in a state of facts, he will be considered as having waived the irregularity, and will not be entitled to have the depositions suppressed.(b) Lord Eldon, in *Willan v. Willan*,(c) says, “ that interrogatories to examine parties must be settled by the Master. I do not know how it is as to witnesses: I know that

(a) *Lesebure v. Wordon*, 19 Ves. 590.

(b) *Willan v. Willan*, 19 Ves. 590.

(c) 19 Ves. 593.

many special orders have been made by the court for the examination of witnesses, and expressly directing that the Master should settle the interrogatories."

In the case of *Parkinson v. Ingram*, the question was, whether the examination of witnesses in town *after* a decree, ought to be before the examiner, or whether the Master had such a power: the court decided that the Master may examine witnesses; but that he himself ought to examine, and not to leave it to his clerk. (*a*) But a witness cannot be examined before the Master, in the same matter to which he, (*b*) or other wit-

(*a*) 3 Ves. 603; Beam. Cha. Ord. 285. Note. But Mr. Turner, in his Cha. Pract. vol. i. 333, says, that in *Lucas v. Temple*, the Master to whom the cause was referred, took on himself the examination of the witnesses, the only modern instance of such a proceeding for a considerable length of time; and as it was clearly settled that the Master cannot examine witnesses by his clerk, the course of practice, therefore, is to file the interrogatories settled and allowed by the Master, at the examiner's office, for the examination of witnesses residing

in town, and to issue a commission for such as reside in the country, and to use the office copy of their depositions, in proceeding on the inquiries before the Master. And see Lord Clarendon's Orders of the 27th Feb. 1667. Beam. Cha. Ord. 218. See also certificate of three of the clerks in court, in *Handley v. Billinge*, 1 Sim. 511.

(*b*) *Sawyer v. Bowyer*, 1 Bro. C. C. 388; *Sandford v. Paul*, 3 Bro. C. C. 370; *Birch v. Walker*, 2 Sch. and Lef. 518; *Vaughan v. Lloyd*, 1 Cox, 312.

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s, (a) have been examined in chief in the
without an order, to be obtained upon
application; and the court will not make
order for the examination of a witness to the
matter, unless in the cases of accident, or
se; (b) and though the re-examination of
former witnesses be upon different interroga-
an order is necessary, (c) with a direction
the Master should settle the interrogato-
d) If such an order is not previously ob-
the court will suppress the depositions,
gh the application for that purpose is not
until after publication. (e)

In case the witnesses reside above twenty miles from London, a commission is granted by the court, upon the Master's certificate of its necessity. A commission for the examination of witnesses, to falsify an examination of a party before the Master, cannot be had without the usual certificate from the Master of the necessity of such a commission. (a) If the order for the commission is improperly granted, the course is to move to discharge the order, not to take exceptions to the certificate. (b) If depositions in a former cause, between the same plaintiff and defendant, are offered in evidence in the Master's office, the Master should receive them, if he thinks them evidence, without putting the party to the expense of applying to the court for an order for that purpose. (c)

It seems that where the interrogatories for the examination of witnesses after a decree are not settled by the Master, they should be signed by counsel.

To bring a witness before a Master, the same *subpœna* issues, as to bring him before the examiner, which is the same as the *subpœna* to

(a) *Bearcroft v. Berkeley*, 2 Cox, 108.

(b) *Chaffin v. Willis*, 1 Dick. 377.

(c) *Anonymous*, 3 Atk. 523.

answer ; but the label expresses the purpose. (a) Depositions taken before the commissioners are filed with the six clerks. (b) In the examination of a witness after a decree, by the Master personally, a circumstance rarely occurring, the depositions are kept in his office, and the publication is by warrant granted by the Master. (c) But in the case of the examination of witnesses after a decree, either by commission, or before the examiner, the publication of the depositions is passed by order of the court, unless publication be passed by the respective clerks in court signing their consent to pass publication. (d)

By the 69th of the General Orders of 1828, the Master shall have power at his discretion to examine any witness *vivâ voce* ; and in such case the *subpœna* for the attendance of the witness shall, upon a note from the Master, be issued from the *subpœna* office ; and the evidence upon such *vivâ voce* examination shall be taken down by the Master, or by the Master's clerk in his presence, and preserved in the Master's office, in order that the same may be used by the court, if neces-

(a) *Parkinson v. Ingram*, 3 Sim. 511 ; *Parkinson v. Ingram*, 3 Ves. 603. 3 Ves. 607.

(b) *Parkinson v. Ingram*, 3 Ves. 607: (d) See certificate of three of the clerks in court, in *Hand-*

(c) *Handley v. Billinge*, 1 *Handley v. Billinge*, 1 Sim. 511.

sary. (a) But if the Master to whom a cause is referred to make inquiries receives affidavits, and they are not objected to on the other side, the Master's reports cannot afterwards be objected to, on the ground that the witness ought to have been examined upon interrogatories. (b) And wherever the matter referred to the Master, originates in a motion or petition, as petitions in bankruptcy and lunacy, the Master proceeds on affidavits; and the same rule applies to a reference upon petition, under the statute of 52 Geo. III. cap. 101, which provides a summary remedy by petition, in cases of abuse of trusts created for charitable purposes. (c) And by the 65th of the General Orders of 1828, all affidavits which have been previously made and read in court, upon any proceeding in a cause or matter, may be used before the Master; and by the 66th of the same Orders, where, upon an enquiry before the Master, affidavits are received, there no affidavits in

(a) Note. By 75th of Lord Bacon's Orders, Beam. Cha. Ord. 33, no affidavits shall be taken or admitted by any Master of the Chancery, tending to the proof or disproof of the title or matter in question, or touching the merits of the cause; neither shall any such matter be colourably inserted in any affidavit for serving of process. And by the 76th of the same

Orders, no affidavit shall be taken against affidavit, as far as the Masters of the Chancery can have knowledge, and if any such be taken, the latter affidavit shall not be used nor read in court.

(b) *Morgan v. Lewis*, before the Vice Chancellor, after Hil. T. 1818.

(c) *Ex-parte Greenhouse*, 1 Swanst. 60.

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shall be read, except as to new matter, may be stated in the affidavits in answer; all any further affidavits be read, unless required by the Master.

It is almost unnecessary to state, that by the order in a suit for the administration of assets, the Master is directed to cause advertisements to be published, for creditors to come in before the Master, and prove their debts. The second advertisement for creditors to come in and prove their debts, may be had from the Master, about a month or six weeks after the insertion of the first in the Gazette; the second advertisement is

for the creditor prepares a charge, which is left at the Master's office; and a warrant is served on the clerk in court of the parties interested in the distribution of the assets. Creditors for small sums of 20*l.* or 25*l.* each, or under, are allowed to join in one charge; but separate affidavits of each creditor, in support of their respective debts, are required. (a) Creditors under decrees of this description, are usually examined upon a general set of interrogatories, as they bring in their respective claims; or a particular creditor may be examined upon a particular set of interrogatories, to meet his case. The latter as well as the former interrogatories, it seems, are settled by the Master. (b) Affidavits made by the creditor, in support of his debt, are usually received by the Master; the reason of which is, that a person shall not come here and claim a debt, without giving that assurance that it is due, which arises from his affidavit; but where the debt is contested, no attention is to be given to the affidavit. (c) By the 72nd of the General Orders of 1828, the Master shall be at liberty to examine any creditor, or other person, coming in to claim before him, either upon written interrogatories, or *viva voce*, or in both modes, as the nature of the case may appear to him to require,

(a) 1 Turn. Cha. Pract. 665.

(c) Fladong v. Winter, 19 Ves. 199.

(b) 1 Turn. Cha. Pract. 366.

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dence upon such examination being taken at the time by the Master, or by the Master's clerk, in his presence, and preserved, in that the same may be used by the court, if necessary. To save the expense of a commission, in the case of a creditor of weak mind, or of small property, the court, in analogy to the mode of taking the answer of a person of weak mind by guardian, has ordered that the Master be at liberty to receive any proof that appears to him satisfactory, although no proof is made by the party himself, or his counsel. (a)

creditor is not generally allowed his costs

The form of a decree in a creditor's suit is, that before creditors are admitted under the decree, they are to contribute to the expense of the suit, a sum to be settled by the Master ; but if the plaintiff in such a suit, fails to pursue the decree, and to call for contribution to be settled by the Master, he waives all claim to a contribution. (a) It may be useful to observe, that sums below 10*l.* payable out of court to a number of persons, may be ordered to be paid their solicitor, to save expense of a power of attorney. (b)

In the case of legatees and next of kin coming in under a decree, when they are in the Master's office, the course of proceeding is similar to the proceeding upon charges by creditors.

The General Orders of 1828 have been in this section frequently referred to ; and it will be proper to refer the reader also to the Orders 78, 79, 80, 81. By the 78th Order, such of the foregoing orders as limit, or allow any specific time for any party to take any proceedings, or for any other purpose, shall only apply to cases, where the period, from which such specified time is to be computed, shall be on, or subsequent to, the first day of Easter term then next ensuing. And by the 79th Order, such of the foregoing or-

(a) *Shortley v. Selby*, 5
Mad. 447, 448.

(b) *Brandling v. Humble*,
Jac. 48.

Sales before the Master.

relate to the manner in which the costs of
t or proceeding are to be taxed, and to the
t of costs to be paid on any occasion, shall
ply to any costs which shall have been in-
or to the costs of any proceeding, which
ave been had or taken, previously to the
y of Easter term then next ensuing. And
80th Order, such of the foregoing orders as
o the course of proceeding in the offices of
sters of the court, or to the authority of the
s, shall have effect from and after the first
Easter term then next ensuing; and shall
d upon by the Masters in all cases, except
from the then-advanced stage of any pro-
t they are not practically applicable. And

nature having previously been procured to the draft of the advertisements. Where it appears to be for the benefit of the parties interested in the sale, that the estate directed to be sold, being situated a considerable distance from London, should be sold in the country, instead of the public sale-room of the court, an order was obtained, authorising the Master to appoint a proper person, and a time and place. But now, by the 75th of the General Orders of 1828, in cases where estates or other property are directed to be sold before the Master, the Master shall be at liberty, if he shall think it for the benefit of the parties interested, to order the same to be sold in the country, at such place, and by such person, as he shall think fit. And if it appears to be for the benefit of those interested in the sale, that a bidding should be reserved on their behalf, an order may be obtained, directing the Master to fix one reserved bidding for the estate, if sold entire ; or if in lots, one bidding for each lot, and to make such reserved bidding one of the conditions of sale ; and a note in writing, mentioning the sum fixed for such bidding, is to be delivered by the Master, under a sealed cover, to the person appointed to sell ; but liberty will be given to the Master to use his discretion as to communicating such reserved bidding to the parties or their solicitors. (a) However, cases occur

(a) *Jervoise v. Clark*, 1 Jac. and Walk. 391.

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When the court think it more prudent, instead of making it imperative on the Master, to reserve bidding, to leave it to his discretion to fix upon a reserved bidding, if he should think it fit. (a) The court further directs, that in no person shall bid a higher price than the one mentioned in such note, the Master, or the person appointed to sell the estate, do declare the estate not sold; but to have been bought on account of persons interested in the estate. Where an estate in the country, directed to be sold, is of considerable value and extent, the Master usually employs his own clerk to sell the same; but where the estates are of a small value, and at a considerable distance from London, the Master

and subscribes his name in a book prepared for the purpose, to give a sum bid by him for the lot in question: if no person is found to advance upon the last bidder, he is declared the purchaser; he then procures a report from the Master, of his being the best purchaser; he must then proceed in the usual course of confirming the Master's report, which will be mentioned in the next section; the purchaser, after having confirmed the Master's report absolutely, is entitled to a conveyance of the estate, on payment of the purchase-money; and may obtain an order for leave to pay his purchase-money, and to be let into possession, and the receipt of the rents and profits of the estate, as from the last quarter-day preceding the application, except in the case of collieries, where the purchaser is entitled to the profits only from the preceding month, there being no such thing as a quarter-day in such concern, and the profits being settled monthly. (a) And in the case of sales of manors, where deaths and admissions happen before the quarter-day, at which the purchaser is to be let into the possession of the profits, the fees due on such deaths and admissions, but not paid or assessed until after that period, belong to the vendor, and not to the purchaser. (b) But the purchaser of a life interest in stock, sold before a Master, is entitled to a dividend becoming due the day following the

(a) *Wren v. Kirton*, 8 Ves.
502.

(b) *Garrick v. Lord Camden*,
2 Cox. 231.

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Although the report was not then confirmed, the purchase-money paid. (a) But before the purchaser makes an application for the above order he ought to be well satisfied with the title for the order recites that he is content with the title. If, therefore, the purchaser, after looking into the abstract of the title, has no objections to it, he ought to procure an order for a reference to the Master, upon the title. And if the Master reports against it, he is discharged from the purchase; the purchaser is entitled to the costs of the reference, although the Master reports in favour of the title. (b) The plaintiff, upon this application by

chaser may pray a reference to the Master on the title (if that reference has not already been obtained). If the purchaser disobeys this order, without objecting to the title, the vendor may obtain another order that the purchaser should pay in his purchase-money within a certain time, or that he stand committed. (a) An injunction may be obtained upon motion, to restrain a purchaser under a decree, not a party to the cause, who has not paid his purchase-money, from committing waste on the property purchased. (b) Also, the purchaser may, upon the motion of the plaintiff, be discharged from the purchase, and a re-sale will be directed, if the former takes no steps for a considerable time after the report has been confirmed absolutely, or is in prison for debt, and insolvent. (c) But the court will not order the purchaser to pay in his purchase-money before the confirmation of the report. (d) If, therefore, the purchaser should not come forward, and take the necessary steps to confirm the Master's report, they must be taken by the vendor before he can proceed compulsory against the purchaser ; and the vendor may confirm the order *nisi*, obtained by the purchaser, if the latter neglects to do it, and is not obliged

(a) *Lanadown v. Elderton*,
14 Ves. 512.

(b) *Cassamajor v. Strode*, 1
Sim. and Stu. 381.

(c) *Hodder v. Ruffin*, 1 Ves.
and B. 544.

(d) *Anonymous*, 2 Ves. J.
335.

Sales before the Master.

tain a new order nisi. (a) And it seems the report is confirmed by the *vendors*, it is necessary, previous to the application against purchaser that he be ordered to pay in his own money, that an abstract of the title be delivered to him. (b) If, after the Master's report of the best bidder, but before confirmed absolutely, it is discovered that purchaser was insane at the time of the bidding, the court will order the estate to be re-sold absolutely. (c)

It may happen, that although a person is ordered to be the best purchaser; yet before he confirms the report absolutely, the bidding

case must be governed by its special circumstances. (a) But the court expects a larger advance than in ordinary cases; 600*l.* upon 3800*l.*, was held sufficient. (b) The court has permitted biddings to be opened upon a second application. by the same person, the purchaser not appearing, or objecting. (c) Where several lots have been purchased by the same person, and the biddings are ordered to be opened, as to some of them, which were first purchased, the purchaser will be allowed the option of retaining, or retiring from the subsequent purchased lots. (d) A residuary legatee may open the biddings, as may tenants for life, and remainder men, of the property to be sold. (e)

The amount of the advance which the court will require, is not fixed by any general rule. In some cases, the court has taken 10 per cent; (f) in

(a) *Thornhill v. Thornhill*, 2 Jac. and Walk. 348. *Williams v. Attenborough*, 1 Turn. 76. See *Tait v. Lord Northwick*, 5 Ves. 655. *Ward v. Lee*, before Sir J. Leach, V. C., 15th Jan. 1818. *M'Culloch v. Colbatch*, 3 Mad. 314.

(b) *Tyndall v. Warry*, Jac. 525.

(c) *Preston v. Barker*, 16 Ves. 140.

(d) *Price v. Price*, 1 Sim. and Stu. 386.

(e) *Cooper v. Goodwin*, Coop. 95.

(f) Vide observations of Lord Eldon, in *White v. Wilson*, 14 Ves. 151. *Brooks v. Snaith*, 3 Ves. and B. 144.

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cases, the court has required more, particularly in small sums; (a) and in some cases, the court has been satisfied with less. (b) But an offer of 350*l.* upon 5300*l.* is not sufficient, in a creditor's suit. (c) But the sum offered in advance must be at least 40*l.* (d) But where there are two lots, and this objection is made as to one of them, the court will, on a notice of application for that purpose, direct that the two lots be re-sold in one. (e) But the rules which govern the practice of opening biddings upon a landed estate, do not apply, where a colliery is the subject of sale: thus, upon an offer to buy 10,000*l.* for a colliery sold for 8,850*l.*, a notice to open the biddings was refused. (f)

charges, and expenses, occasioned by his bidding for, and being reported the best purchaser of, the lot in question; (a) the court leaving it to the Master, to make the allowance, according to the practice. (b) The deposit made on opening the bidding, is considered as part of the purchase-money; therefore, if it is invested in the public funds, and the depositor is afterwards confirmed the best purchaser, and the stocks rise in the mean time, the estate will have the benefit of the rise. (c) So, if the stock fall, there is no instance of the purchaser being called upon, to make good the deficiency arising from such fall; (d) therefore the depositor is not entitled to the dividends accruing, between the time of the deposit, and completion of the purchase; but only to interest of 4 per cent on the deposit. (e) But if the person who opens the biddings, is outbid at the re-sale, he will be discharged, and his deposit will never be made a security for a subsequent bidder. (f) The former will not be entitled to his costs, however highly his interference might have benefited the estate; (g) unless he has opened the biddings,

(a) *Hand's Cha. Pract.* 142.(e) *D'Oyley v. Countess of*(b) *Anonymous*, 2 *Ves. J.**Powis*, 1 *Cox*, 206.

286.

(f) *Williams v. Attenbo-*(c) *Ambrose v. Ambrose*, 1 *Cox*, 194.*rough*, 1 *Turn.* 77.(g) *Earl Macclesfield v.*(d) *D'Oyley v. Countess of* *Powis*, 1 *Cox*, 206.*Blake*, 8 *Ves.* 214. *Trefusis v. Clinton*, 1 *Ves. and B.* 361.

Sales before the Master.

his own benefit, but for the benefit of all concerned. (a)

ere a solicitor has opened the biddings, on half of a sham bidder, and afterwards set up bidders, the court discharged the report of being the best bidders, and ordered that the or should stand as the best bidder, at the t which he opened the biddings. (b)

generally, the court will not permit bid- o be opened, after the Master's report has onfirmed absolutely, although a great ad- s offered; (c) or although the delay of the

tage, (a) the confirmation of the Master's report will not prevent the biddings from being opened.

A solicitor in the cause, bought in lots to prevent a sale at an undervalue ; upon an application by him afterwards, that he might be discharged, and for a re-sale of the lots, the court refused the application, as the effect of a bidding by the solicitor in the cause, is, that the sale is immediately chilled. (b) But in a case in the Exchequer, (c) where the plaintiffs, who were tenants for life of the money to arise from the sale of real estates, had employed a person to bid at the sale of a lot, in order to prevent it from being sold under a certain sum, and who accordingly bid, and became the purchaser, at a less sum than that at which the estate had been valued, the court discharged him from the purchase, though there had been a competition at the sale, and though most of the persons entitled to the purchase-money in remainder, were infants ; but no opposition was made to the application. But the safest mode of proceeding, in order to prevent the lot from being sold at an undervalue, is, for the plaintiffs, previously to the sale, to apply to the court for a re-

(a) *Watson v. Birch*, 4 Bro. C. C. 172. *Morice v. the Bishop of Durham*, 11 Ves. 56. *Vide Prideaux v. Prideaux*, 1 Bro. C. C. 287.

(b) *Ex-parte Towgood*, 11 Ves. 517.

(c) *Noel v. Lord Henley*, 28th July, 1821.

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e to the Master, to fix upon a reserved
g, if he should see fit. (a) A party who
ts to bid, in consequence of the auctioneer
ng, that a person may open the biddings,
comes within eight days after the report,
allege surprise, as a ground for opening
ddings, if he does not come within that
b).

ore we leave this subject, it is necessary to
e, that a person may be substituted for a
ser, without the necessity of an applica-
r a re-sale, upon the latter consenting to
ng done, and the former paying the ne-

ceeds to make his general report thereon to the court. But it is frequently found inconvenient to the parties, or to some of them interested in the enquiries directed to the Master, to wait as to some of the matters for this report ; as where the decree directs an enquiry to be made for the maintenance of infants, &c. In such cases it may be made part of the decree, or an order might have been obtained, that the Master be at liberty to make a separate report with respect to the matters in question. But by the 70th of the General Orders of 1828, in all matters referred to him, the Master shall be at liberty, upon the application of any party interested, to make a separate report, or reports, from time to time, as to him shall seem expedient, the costs of such separate reports to be in the discretion of the court. And by the 71st of the same Orders, where a Master shall make a separate report of debts, or legacies, there the Master shall be at liberty to make such certificate as he thinks fit, with respect to the state of the assets ; and every person interested, shall thereupon be at liberty to apply to the court, as he shall be advised. But the court has gone the length of permitting a sum of money to be paid, in part of a legacy, on motion, without a separate report, the fund being admitted to be ample, and it being consented to. (a)

(a) *Pearce v. Baron*, 12 Ves. 459.

The Master's Report,

Master, previously to making his report, takes a draft of it, and a warrant must be taken and served upon the respective clerks in and of the parties in the suit, under-written, "The Master has prepared his report;" and copies of a draft of this report must be taken from the Master's office by all parties who attend, and warrants must be successively taken out "to proceed and settle the draft of the general report." When attending before the Master upon these warrants the parties must state to the Master their objections to the proposed report. The evidence upon which the objections are grounded must be presented before the Master has settled his report,

ceeding in the Master's office shall be allowed to be taken out, except by permission of the Master, upon special grounds to be shown to him for that purpose; and the costs of such review, when allowed, shall be in the discretion of the Master, and shall be paid by and to such persons, and at such time, as he shall direct.

When all the objections to the draft have been disposed of, the Master finally settles the same, of which a transcript or engrossment on paper is made, and a warrant to sign the report must be taken out, under-written, "at which time the Master will sign the report;" between the service of which, and the return thereof, there must be four clear days, exclusive of the day of service; and the warrants should be served on the respective clerks in court; and any party who intends to except to the report, must bring in the objection in writing to the draft within four days limited by the warrant; otherwise he cannot afterwards except to the report. (a) But, upon a special case, he is allowed to do it; as where it appeared, by the affidavit of the solicitor of the party, that the former had neglected to carry in objections to the report, from not being aware that it was necessary, to object to the report in the draft, in order to en-

(a) Harr. Cha. Pract. 1808, Sed vide *Allen v. Allen*, 1 Dick. 479; Wy. Pract. Reg. 382. 362, contra.

The Master's Report,

m, on his client's behalf, to file exceptions :
indulgence was given, although the report
been confirmed *nisi*, upon payment of the
of the application. (a) So, if it appears that
rk in court did not give to the solicitor
which had been served on him, fixing a day
he Master's report would be settled, leave
e given to file exceptions to the Master's
(b) Also, the court, if it sees reason to be
sified with the report, will refer it to the
to review his report, with liberty to take
ons to it. (c)

on reference to the Master, to consider

The report will not be signed until the objections have been disposed of. And if the party bringing them in, does not proceed with the requisite expedition, any other party may take out warrants to proceed on the objections; when the Master has fully considered his report, he will sign it; the solicitor may then take it away.

The report of the Master ought to be as succinct as may be, reserving the matter clearly for the judgment, and without recital of the several points of the orders in reference, or of the debates of counsel; and if he makes a separate report, he is not to set forth the evidence with his opinion upon it, but only to state the bare fact, for the opinion of the court, in the same manner as in a special verdict. (a) But in decrees for account, the Master may, if he thinks proper, state special matters, although he has no direction for that purpose. (b) Where the Master stated his disallowance of a certain sum, not on the merits, but on the complicated nature of the claim, the Master is right in stating his reason for the disallowance, though not directed by the decree; for if the Master had simply disallowed the claim, it would have appeared, as if he meant to conclude

(a) Beam. Cha. Ord. 208;
The Duchess of Marlborough v.
Wheat, 1 Atk. 453.

(b) Anonymous, 2 Atk. 620.

The Master's Report,

defendant with respect to it; and it was his
to state, that he did not mean that conclu-
(a) When the court requires to be satisfied
Master, touching any matter alleged to be
confessed or set forth in the defendant's answer,
intended that, without further order, they
take consideration of the whole answer or
of the defendants, and certify not only
whether the matter be so confessed or set forth,
or any other matter, avoiding that confession,
denying the same, that the court may receive
just and true information. (b) If the Master
is directed to ascertain a particular fact, he ought
not to draw a conclusion from the evidence
before him, and not merely to state the circum-

After the report is signed by the Master, it is to be filed with the register, strictly within four days after signing; (a) but it is sufficient, if the report be filed before any proceeding be had thereon. (b) After this, an order must be obtained to confirm the report, *unless* the adverse party, being personally served with such order, shall, within a specific time after such service, show cause to the contrary. But this order is necessary, only where the report is to be the ground of a decree; therefore his report on the alleged scandal or impertinence of pleadings, or on the insufficiency of an answer, need not be confirmed, (c) nor his taxation of costs, (d) nor his report of a receiver's account. (e)

This order, we have seen, must formerly have been served personally, and in the case of a purchaser confirming the Master's report of his being the best purchaser, upon all the parties in the cause. But now, by the 21st of the General Orders of 1828, service of the order *nisi* upon the clerk in

(a) Beam. Cha. Ord. 293.

of Lord Bacon's Orders, Beam.

(b) Eyles v. Ward, 2 P. W. 516.

Cha. Ord. 22, it is ordered that no order shall be made for the confirming or ratifying of any report, without day first given by the space of a seven nights, at the least, to speak to it in court.

(c) Harr. Cha. Pract. 1808, p. 481; Martyn v. Broughton, 3 Swanst. 232.

(d) Harr. Cha. Pract. 182.

(e) Cowper v. Earl Cowper, 2 P. W. 729. Note. By 46th

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of any party is sufficient. If no cause is within, or on the expiration of the time named in the order, after service of it, it may be absolute, upon an affidavit of the service, certificate from the register, that no cause is dated on the day of applying for the order. But by consent, a report may be conclusive absolutely in the first instance. (a)

proper here to mention, that in a suit to release a mortgagor, after the Master has made report of what is due for principal and interest under the usual decree, if the mortgagor does not pay what is reported due within the time named in the decree, the mortgagee applies to

overruled. (a) In a reference to the Master for scandal and impertinence in a bill or answer, if the Master report it neither scandalous nor impertinent, the party, who is dissatisfied with the Master's report, must show wherein, and in what line or page, and how far the pleadings are scandalous and impertinent, in order that such improper matter may be expunged; and it is not sufficient to say in general, that the record in question is scandalous or impertinent. (b) So, when exceptions are taken to an answer for insufficiency, and the Master reports it sufficient, the plaintiff, in his exceptions, should show where the answer is insufficient. (c) But in a case, where the Master reported a schedule to an answer impertinent, the court permitted the defendant to file a general exception, in order to avoid the expense which would be incurred, if the defendant were obliged to set forth in his exceptions the whole matter of his schedule, which had been reported impertinent. (d) And an exception to a report, in general terms, that the Master had reported an examination sufficient, whereas he ought to have reported it insufficient, is regular. (e) A

(a) *Hodges v. Solomons*, 1 Cox, 249.

(c) *Craven v. Wright*, 2 P. W. 181.

(b) *Craven v. Wright*, 2 P. W. 181. Sed vide *Mackworth v. Briggs*, 2 Atk. 181.

(d) *Norway v. Rowe*, 1 Mer. 135.

(e) *Purcell v. M'Namara*, 12 Ves. 166.

The Master's Report,

ant is at liberty to except to the Master's
of impertinence, after the order to expunge,
any time before any proceeding on that
(a) It is proper to add, that a defendant,
omitting to answer without excepting to
t report of insufficiency, has not precluded
f (if he insists on the same matter by his
answer, which he may do) from excepting
like report of the second answer; and the
will go into it, provided there are several
ons; but, perhaps, in the case of a single
on, the case would be different. (b)

e exceptions must be filed with the re-

side, within the time mentioned in the order *nisi*, to confirm the report absolutely, and the exceptions must be set down with the register. (a) These steps being taken, they may be shown as cause against making the order *nisi* absolute, and the court then stays proceedings on the report; but filing the exceptions, and making the deposit alone, are not cause; (b) the order for setting them down must likewise be obtained before the report is confirmed absolutely; (c) either party may obtain that order; (d) but if exceptions are filed after the report has been confirmed absolutely, they will be ordered to be taken off the file. (e) Upon all questions of fact, the only mode of objecting to the Master's report, is by excepting to it; and therefore, although the Master, in his report, states special circumstances, and the cause is afterwards set down for further directions, without exceptions taken to it, the court will not

(a) Note. By the Order of the 29th Oct. 1692, Beam. Cha. Ord. 292, all reports and certificates that are made and signed by any of the Masters, are required to be by him (who takes the same from the Master) filed with the register within four days from the signing thereof. It seems, however, sufficient, if they be filed before any proceedings have been had thereon, though not within four days after it was made: *Eyles v. Ward*, 2 P. W. 517.

(b) *Abel v. Nodes*, 2 Cox, 169. See *Wilson v. Allen*, 1 Jac. and Walk. 617.

(c) *Geldart v. Moss*, 4 Ves. 617.

(d) *Ibid.*

(e) *Stirling v. Thompson*, Coop. 271.

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permit objections to be taken to the report, upon facts stated in it, excepting, perhaps, in the case where the Master has made a wrong decision in point of law. (a) But the court will, in some cases, let the exceptant in to argue his exceptions. (b)

Though the regular time for excepting to a report, where it requires confirmation, is before it is confirmed absolutely, yet there are instances, where the court has permitted exceptions to be taken after the confirmation of the Master's report. (c) as where the party who was prejudiced by the Master's report was a lunatic at the time of the report, although he had a committee. (d) But

With respect to exceptions to a report, which does not require confirmation, as on the sufficiency of an answer, or whether pleadings are scandalous or impertinent, there does not appear to be any precise time for filing such exceptions. (a) Exceptions, under particular circumstances, have been allowed to be taken *nunc pro tunc* to the Master's report of the insufficiency of an answer, though after such report a plea and further answer were put in, and the plea overruled, where the merits appeared to be much in favour of the defendant, and the plea had been put in by mistake. (b)

It is material, however, to observe, that if the Master reports an answer insufficient, he is directed by the 8th of the General Orders of 1828, to fix the time to be allowed the defendant for putting in a further answer; and any defendant who shall not put in a further answer within the time so allowed, shall be in contempt, and dealt with accordingly. (c) And therefore the plaintiff may

(a) Hind, 272.

(b) Noel v. Ward, 1 Mad. 339.

(c) See ante, title, Reference of Answer, p. 266, Note. See General Orders of July, 1683, Beam. Cha. Ord. 258, by which it is directed that after a report

filed of an answer whether certified sufficient or insufficient, whereon costs are due, no exceptions shall be admitted to such report by either party, unless such exceptions shall be filed with the register within eight days' service of a *subpana*

The Master's Report,

at an attachment for want of an answer ;
which, it seems the defendant cannot except
Master's report.

er an answer has been reported insufficient,
er to amend, and for the defendant to answer
endments and exceptions together, prevents
fendant from taking exceptions to the re-
f the order to amend is served before the
ions are set down ; but if the exceptions
t down before the order is served, the order
ate. (a) And if a defendant obtains an order
e to answer exceptions, it is a submission
wer, and precludes the defendant from ex-
r (b) And it is also necessary to add that

after an order to expunge, until the impertinence has actually been expunged. (a) But an application must be previously made to the court for suspending or discharging the order to expunge. (b)

The exceptions being put down in the paper of the day, and a copy of the report and exceptions being, before the day of hearing, left with the court, each exception, if there are more than one, is discussed in its turn separately by counsel, and decided by the court after the argument of the exception. No evidence shall be admitted in support of them, but what was laid before the Master upon the objections; (c) neither will the court permit affidavits, to be received in opposition to the report, made subsequent to it. (d) However, if such evidence clearly shows error in the Master's report, the court will direct the Master to review his report, upon the exceptant giving up the deposit. (e) And if the Master, by his report, states that he had not allowed a discharge to an executor for want of evidence, but

(a) *Norway v. Rowe*, 1 Mer. 135; *David v. Williams*, 1 Sim. 17. parte *Bux*, 2 Ves. 389; *East India Company v. Keighley*, 4 Mad. 28.

(b) *Mortimer v. West*, 3 Swanst. 223; *Wademan v. Birch*; *ibid.* 230, in note. (d) *Davis v. Davis*, 2 Atk. 20.

(c) *Primrose v. Bromley*, Mich. Vac. 1739. See *Ex-* (e) *Hedges v. Cardonnel*, 2 Atk. 408. Vide *Da Costa v. Da Costa*, 3 P. W. 141.

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received a claim, and the report is excepted
it is admitted that the evidence before the
did not warrant the claim, but that addi-
evidence clearly establishes it, to support
ceptions, it must be shown that the Master
to have allowed the discharge on the evi-
before him ; and if the Master refuses to
on the additional evidence, a motion should
le for directing, that he should receive it. (a)
ter exceptions have been argued, leave has
iven to re-argue the former exceptions, and
e new exceptions as to one subject of
, to come on at the same time. (b) If the
ons are allowed, the deposit is returned to

But it is proper here to observe, that there are some reports, which cannot be objected to in the form of exceptions, as a report of maintenance for an infant; (a) of a proper person to be his guardian; (b) or on a reference to see whether a suit brought in the name of the infant be for his benefit; (c) or a report relative to infants being trustees within the statute of 7 Anne. (d) In these cases, the proper mode, if the report appears to be incorrect, is to present a petition to the court, praying that the Master may review his report. (e) It may be useful here to remark, that exceptions will not lie to the return of commissioners, in a suit for a partition, on the ground of inequality of the value of the lots: the proper course is to move to suppress the return. (f)

The plaintiff may except to the report, and, at the same time, set down the cause for further directions; for it is not unreasonable for the plaintiff to object to one item of the Master's report, and at the same time say, if the court shall be of opinion that the Master is right, he desires that the cause may go on. (g) However, in the case of Whitaker

(a) *Ex-parte Nicholls*, 1 Bro. C. C. 577.

(b) *Cromwell v. Roper*, 26th May, 1787.

(c) *Whitaker v. Marlar*, 1 Cox, 285.

(d) *Ex-parte Barton*, 1 Dick. 395.

(e) *Ibid.*

(f) *Jones v. Totty*, 1 Sim. 136; *Corbet v. Davenant*, 2 Bro. C. C. 252.

(g) *Yeo v. Free*, 5 Ves. 424.

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lar, (a) it is said by the court, that in that
any objection to the Master's report must
be on the motion to confirm the report.

SECTION IV.

Issue, and Special Case.

have hitherto spoken of references to the
to ascertain particular facts; we also ob-
that the court is likewise in the habit, in
lar cases, where any material question of
cannot be safely decided, upon the evidence
ed, to send the question to a jury, in order

tion, whether an instrument was obtained by fraud; but if the application on the answer, is merely for an issue to try whether the plaintiff was of competent mind to execute a deed, and nothing more, and that could not be tried in ejectment; it seems that such issue would be directed, according to the course which is now followed in references of title on motion. (a) An issue is usually directed at the hearing. The court refers it to the Master, to settle the form of the issue, and also directs, who shall be plaintiff and defendant, and when and where the action shall be tried, whether at bar, or at the assizes, or at the sittings in London or Middlesex. The plaintiff in the issue, has the choice in what court the action shall be tried, excepting that, if he wishes to have it tried in the Exchequer, he must state some special reason for having it tried in that court. (b) The court will, on special circumstances, direct a trial at bar; in doing which the court is influenced by the solemnity of such proceeding, and by the probable length of the examination; (c) and in granting such a trial, the court has required the consent of the party who applied for it, that he would be content with his *nisi prius* costs, if he prevailed. (d) With a view of a thorough investigation, the court like-

(a) Fullager v. Clark, 18 Ves. 481.

(c) Attorney General v. Montgomery, 2 Atk. 378.

(b) Antrobus v. East India Company, 5 Mad. 3.

(d) Baker v. Hart, 3 Atk 545.

Issue.

directs that particular matters shall be produced or allowed in evidence, as that the answer of the defendant shall be read. (a) For the court to exercise power over every party in the cause, who is interested in the question to be tried at law, to order such production of books and papers, and exhibits, as is necessary for a complete trial; and there is no difference in this respect, whether the party in question declines to be a party to the trial. (b) The court also will order, that the plaintiff or defendant shall attend and be examined; but liberty for each party to examine the other party, cannot be ordered, unless consented to. (c) No objection is waived by the party, except that which arises from his being

the time of the trial, or proved to be in such a state of health, as not to be capable of attending, shall be then read. (a) The same order may be obtained in an action brought under the direction of the court. (b) But on the application for the order, the inability of the witness to attend at the trial, must be proved by affidavit. (c) The order that the depositions shall be read at the trial of an issue is necessary, not to render the depositions evidence, but only to save the expense of proving the bill and answer, and other proceedings; the deposition of a deceased witness in a suit in Chancery, is evidence at law after preliminary proof of the bill, answer, and issue joined: the order is an authority to the judge, to receive the evidence, without that introductory matter. (d) And where a deposition *de bene esse* (to the taking of which, any irregularity of any kind, might have been effectually objected, before the hearing of the cause) has been read at the hearing of the cause, it is of course, if any issue is directed, to order it to be read at the trial; and the court will not afterwards discharge the order for reading the deposition in question, on the ground of irregularity in taking it, although the party complaining of

(a) *Palmer v. Lord Aylesbury*, 15 Ves. 176, and note in *Corbett v. Corbett*, 1 Ves. and B. 339.

(b) *Corbett v. Corbett*, 1 Ves. and B. 335.

(c) *Ibid.*

(d) *Gordon v. Gordon*, 1 Swanst. 170.

Issue.

order did not know of the irregularity till the hearing, and although the time was short between the publishing of the deposition and the hearing of the cause; as the complaining of the order might have afforded time, to examine whether the deposition published had been regularly taken. (a) The trial of an issue *devisavit vel non*, directed by the court, *all* the witnesses to the will must be sworn; those three witnesses are not the witnesses of the one party nor the other, but the witnesses of the court; the issue is also part of the proceedings, and is so considered on a motion for a new trial. (b)

The probable absence of counsel will induce the court to postpone the trial of the issue. (a) Where a decree directs an issue to try the validity of *moduses*, and the plaintiff wishes to have the issue tried in a different county, from that in which the land lies, an order for that purpose cannot be inserted in the decree, but must be obtained by petition. (b) After the trial has been had, the judge before whom the issue was tried, certifies how it was found; but it is not usual to enter up judgment upon the verdict. If the plaintiff in the issue, does not proceed to trial, at the time directed by the court, the adverse party may obtain an order, that it should be taken *pro confesso*; and for that purpose, the cause may be set down for further directions. (c) And a defendant neglecting to name an attorney for the purpose of trying an issue, was directed to do it in four days, or the issue to be taken as tried, and a verdict for the plaintiff. (d)

If the party, against whom the verdict is found, is dissatisfied with it, and wishes for a new trial, the application for one must be made, if the verdict was found in an action brought by the direc-

(a) *Bearblock v. Tyler*, 1 Jac. and Walk. 225.

(b) *Sparke v. Ivatt*, 1 Sim. and Stu. 366.

(c) Before Lord Eldon, 20th Dec. 1813.

(d) *Wilson v. Ginger*, 2 Dick. 521.

Issue.

f this court, to that court in which the
was brought; (a) if it was found on an
to this court; previously to which, in the
case, it is necessary to procure a copy of
dge's report, who tried the cause, which is
ed by means of this court's application to
But the Court of Chancery will not call
he judge, who tried the cause at law, to
his report, until satisfied that there are
able grounds for entertaining the motion
new trial: the court will be satisfied with
statement of counsel who attended the trial,
trequiring an affidavit of the fact. (b) Thus
ce Chancellor, Sir John Leach, has acted
he statement of counsel who attended the

to the judge who directed the issue. (a) And now, by the 47th of the General Orders of 1828, every application for a new trial of any issue at law, directed by a judge of this court, is to be first made to the judge, who directed such issue. It is proper to add, that the form of the issue cannot be changed, on a motion for a new trial ; the propriety of the form of the issue can be questioned only, on an appeal from the decree, by which it was directed ; a petition of appeal may be presented and heard at the same time with the motion. (b)

The verdict must be such as will satisfy the conscience of the court ; therefore a new trial will be directed, if the verdict is contrary to the weight of evidence ; (c) or if the judge has misdirected the jury, (d) or where new evidence is produced, which was not before the jury at the first trial, and is material, although the judge certifies, that he is satisfied with the verdict, and although the court of law would not have granted a new trial ; (e) but not, if the new evidence has been kept back on purpose, by the party applying ; (f) or, although

(a) *Pemberton v. Pemberton*,
11 Ves. 50.

(b) *White v. Lisle*, 3 Swanst.
351.

(c) *Lord Faulconberg v.*
Peirce, Ambl. 210.

(d) *Lord Faulconberg v.*
Peirce, Ambl. 210.

(e) *Stace v. Mabbot*, 2 Ves.
552.

(f) *Standen v. Edwards*, 1
Ves. J. 133.

Issue.

evidence may have been improperly received by the judge, if the court should think, not only at the report, but at the record of the suit in equity, that justice in the whole has been done; (a) yet it abstains from directing a new trial in questions of this kind, only where it is satisfied that the question has been so dealt with that if the evidence rejected had been received, or the evidence received had been rejected, the verdict had been different, the court would have been dissatisfied with the trial. (b) is not a sufficient ground for a new trial, that a party applying was not apprised of a particular point of evidence; as, if there is notice of the trial, to him, that a particular person is

second trial, without setting aside the first verdict, that it may be given in evidence, and have its weight with the jury. (a) This court, as well as courts of law, has frequently granted three new trials. (b) And it has a right to grant a new trial after a trial at bar. (c)

As this court, for the purpose of enabling it to make the decree, requires the assistance of a *jury* upon a question of fact, for the same purpose, if a question at law arises, a case is frequently directed to be made, and sent to a court of law for its opinion on that point; and it seems, that before, and in, the time of Lord Hardwicke, it often happened, that to save expense, the Lord Chancellor would direct a case to be heard and argued before two common law judges, at their chambers, instead of the whole court. (d) A court of law will give its opinion upon an hypothetical case; (e) but will not certify their opinion

(a) *Baker v. Hart*, 3 Atk. London, v. *Morris*, 9 Ves. 165, 542. 169.

(b) *Pemberton v. Pemberton*, 13 Ves. 290. But the court refused a new trial, after two concurring verdicts. *Bates v. Graves*, 2 Ves. J. 287. See 7 Bro. P. C. 187. (d) *Rigden v. Vallier*, 3 Atk. 735.

(e) *Murthwaite v. Jenkinson*, 2 Barn. and Cresswell, 358; *Bliss v. Collins*, 1 Jac. and Walk. 426.

(c) *Baker v. Hart*, 1 Ves. 28; the Wardens, &c. of St. Paul's,

Special Case.

a case stated as a trust. (a) The Master of the Rolls and Vice Chancellor, as well as the Chancellor, will receive the assistance of a counsel of law, upon a special case; although the judges may refuse their certificates on a case, sent by the Master of the Rolls, in *Colson v. Colson*; and the case of *Daintry v. Daintry*, (b) seems to be the instance in which the judges would certify their opinion to him.

Finally, the court refers it to a Master, to settle the case, (c) and likewise directs to what court of law the case shall be sent. After this, a *consilium* is taken for in the court of law, and a rule is ob-

The judges of the court to which the case is sent, after it has been argued by counsel before them, return their opinion to the Lord Chancellor, or to the Master of the Rolls, or the Vice Chancellor, as the case may be, in the form of a certificate, generally without stating their reasons for their opinion. The judges do not usually certify their opinion in open court; but they appear to have done it in *Wright v. Holford*, (a) for the first time. The Court of Chancery is not bound by the certificate of the court of law. (b) If the judge in equity is dissatisfied with this opinion, he may send the same case to the judges of another court of law. It seems that there is only one instance, in which a case was sent back to the same court. (c) And in a late case, the Lord Chancellor being dissatisfied with the opinion of the Court of Common Pleas, called to his assistance the Lord Chief Baron, and one of the judges of the King's Bench. (d) The judges' certificate must be filed in the report office in Chancery, and an office copy taken of it, when the cause is brought on for further directions, or on the equity reserved.

(a) See *Green v. Stephens*,
17 Ves. 72.

(b) *Prebble v. Boghurst*, 1
Swanst. 320.

(c) *Treny v. Hanning*, 10
Ves. 500; *Utterson v. Vernon*,
3 T. R. 539, 4 T. R. 570.

(d) *Prebble v. Boghurst*, 1
Swanst. 309.

Further Directions.

SECTION V.

Further Directions.

or the Master has made his general report on matters referred to him, or after the trial of the action, upon the question of fact, or the certificate of the judges upon the point of law, the cause is again brought on before the court for further directions, or upon the equity reserved. For this purpose the course is, to present a petition to the judge, *i. e.* the Lord Chancellor, or the Mas-

either party may set it down, and either before the Lord Chancellor or the Master of the Rolls, without regard to the circumstance, where it was originally heard. (a)

We have seen, that if exceptions have been taken to the Master's report, those exceptions and further directions may come on at the same time; in which case, a copy of the report, as well as the decree, should accompany the petition. After an issue or an action, the cause cannot be set down, until after the first four days of the term next after the trial are elapsed, that the party, against whom the issue or verdict is found, may have an opportunity of moving for a new trial. Where a matter in a cause had gone to a reference, the party cannot except to the award; but it must come on on further directions. (b) It is proper here to state, that a cause cannot be set down for further directions, on a separate report; for the common language of a decree is, that the consideration of all further directions shall be reserved, until the Master has made his general report; but any order upon the separate report must be obtained upon a petition. (c) Where the Master states in his report, that he cannot take the account which

(a) *Pemberton v. Pemberton*,
11 Ves. 53.

(c) *Van Kamp v. Bell*, 3
Mad. 430.

(b) *Woodbridge v. Hitton*, 1
Bro. C. C. 398.

Further Directions.

court has directed, this is considered the subject of further directions, rather than of exceptions to the report. (a) And if the whole matter rests on the report, a question decided by the court is open on the hearing for further directions without taking exceptions to the report. (b)

After the above steps have been taken, the matter comes on to be heard at the regular time fixed by the court for business of that description which is before the Vice Chancellor in term and on Wednesday, in the vacation on particular days, some of the seal days; before the Master of the Rolls in term and in vacation at the times

by the original decree; (a) but after the usual decree for an account against an administrator, you cannot, on the cause coming on for further directions, obtain by petition, on facts disclosed by affidavits, a reference to the Master to make enquiries as to the balances in his hands from time to time, with a view to charge him with interest. (b) But after a direction of a trial at law, reservation of general directions will be taken to include costs, interest, and every thing. (c) But if issues are directed to try a fact, *i. e.* the validity of notes, and they are found to be forged, the finding is taken to be decisive to the fact to be tried, and the court will not afterwards go into other evidence, which makes it immaterial, whether the notes were forged or not. (d) In the case of infants, the court often gives extra-judicial directions. (e) In Lord Macclesfield's time, in the case of the late Lord Dudley, on the mismanagement of his estate, a stranger came and complained of the guardian, and abuse of the infants' estate; upon this application, and upon his undertaking to pay the costs, the court directed the Master to

(a) *Goodyere v. Lake*, Ambl. 584.

(b) *Parnell v. Price*, 14 Ves. 502.

(c) *Champ v. Mood*, 2 Ves. 470.

(d) *Kemp v. Mackrell*, 2 Ves. 579.

(e) *Earl of Pomfret v. Lord Winsor*, 2 Ves. 484.

Further Directions.

ne the receiver's accounts, to see whether
ants were wronged or not. (a)

ometimes happens, that although the opin-
the court is against the plaintiff's right to
ief which he seeks, yet, as it is possible that
y succeed at law on a question connected
is right to the consequential relief in equity,
ourt will, without directing an issue, or an
, merely retain the bill for twelve months,
liberty for the plaintiff to bring an action,
and in default of his doing so, the bill to be
sed with costs. But if the plaintiff does not
d according to this liberty, the bill does not

defendants is retained, with liberty to the plaintiff to bring a bill against one of them; a trial may take place during an abatement occasioned by the death of one of the other defendants, if the decree does not direct them to attend it. (*a*)

SECTION VI.

Costs.

It sometimes happens, that the court in pronouncing the decree at the hearing of the cause, will then decide the question of costs; it will often, where reference is made to a master to take accounts, or to ascertain material facts, or where an issue is directed, reserve the consideration of costs till the Master has made his report, or till the trial of the issue; and the cause is then brought on for further direction and costs; and in some cases, the court will decree all parties to be paid their costs up to the hearing, when it directs a reference to the Master. And in some cases the court will postpone the consideration of the costs till the cause comes back from the Master, though there might be grounds enough for decreeing costs even at the hearing of the cause, where it is thought the final decree might be thus accelerated. (*b*) But

(*a*) *Humphreys v. Hollis*,
Jac. 73.

(*b*) *Scarborough v. Burton*,
2 Atk. 111.

Costs.

the subject of a suit has been disposed of in court, the court will not hear the cause for the purpose of disposing of the costs. (a) If the decree directs the costs to be taxed, and the costs are to be paid up to the hearing, it is usual, while proceedings are going on before the Master, to issue a warrant for all parties to bring in, and to file, their bills of costs to the hearing of the cause. Copies of the warrants should be served on the respective clerks in court, and the plaintiff's clerk should bring in his own bill of costs, and serve warrants to tax his own costs. If the other parties are dilatory, by the old practice, warrants were to be taken and served on

a case which does not fall within the rule ; (a) and there are cases where the rule itself is dispensed with ; (b) but they appear to be cases of plain mistake, which might have been rectified, even upon a motion to alter the minutes. (c)

Costs in equity are in the discretion of the court; but the party who fails, is *prima facie* taken to be the person to pay them ; and in order to get rid of that liability, he must show the existence of circumstances, which ought to induce the court, in the exercise of that discretion, to withhold the costs ; (d) and a defendant is entitled to his costs, although he has appeared voluntarily. (e)

Where a verdict, on the first trial of an issue in the suit, is given for the defendant, in consequence of a misdirection of the judge, and on the second trial, the verdict is for the plaintiff, the defendant will be ordered to pay the costs of the suit, of the motion for a new trial, and of the second trial, but not the costs of the first trial. (f) Costs of a feigned issue are discretionary in the

(a) Taylor v. Popham, 15 Ves. 78.

(d) Vancouver v. Bliss, 11 Ves. 458.

(b) Owen v. Griffith, Ambl. 520, 1 Ves. 250 ; Turner v. Turner, 1 Stra. 708.

(c) Bowkee v. Grills, 1 Dick. 38.

(e) Wirdman v. Kent, 1 Bro. C. C. 141.

(f) Bearblock v. Tyler, Jac. 571 ; White v. Lisle, 3 Swanst. 342.

Costs.

and do not in all cases follow the verdict. (a) Generally speaking, the party in whose favour the issue is found, shall have the costs of trying the issue, except in the case of an heir at law, concerning a will in a bill to establish it. (c) When issues are directed, and one is found in favour of the plaintiff, and the other of the defendant, the party in whose favour the material issue is found, shall have his costs at law; (d) but the costs of an unsuccessful application for a new trial, do not of course fall within the costs of the suit; (e) and for not going to trial, ought to be moved for. (f)

It were an almost endless undertaking, and foreign to a work professing to treat only on the practice of the court, to attempt to state all the different circumstances which have influenced the court in deciding on the question of costs. But where it is possible to meet with general rules on this subject, it may be proper to mention them.

An infant, whether he is plaintiff or defendant, is not personally liable to costs; (a) but if he is plaintiff, his next friend, who files the bill, is liable to costs, if the suit is improperly instituted; and if the bill be dismissed with costs, upon a fact which a next friend might have known, if he had used reasonable diligence, he will not be allowed the costs out of the infant's estate. (b) But if the plaintiff, after having attained his age of twenty-one years, chooses to proceed with the suit, he will be then liable to the whole costs. It is a prudent step in the *prochein amy*, after the answer comes in, and if it is probable that the suit will be attended with expense, to obtain a reference to the Master, to see if it is for the benefit of the infant that the suit should be continued; and if the Master reports in favour of the continuance of the suit, and there is no laches, or misbehaviour in carrying it on, the court will always order the

(a) *Turner v. Turner*, 1 Stra.
708.

(b) *Pearce v. Pearce*, 9 Ves.
548.

Costs.

to be allowed out of the infant's estate. (a)
the case of a *feme covert* suing by her
friend, the latter, and not the *feme covert*,
is liable for the costs. Where the next friend
feme covert had taken the benefit of the
debtor's act, but was detained in prison,
and obtained an order upon the husband
for payment of his groats after the answer was
given and before any other proceeding taken
in the cause, although a motion by one of
the defendants that the next friend might be
discontinued, and another appointed, was refused, as
improper in form, yet leave was given to
stay proceedings until the next friend

even though they raise a question for their own benefit, if it is merely by way of submission, (a) are entitled to be paid their costs. But they may lose their costs, if their negligence occasioned the suit, (b) or where the act required to be done leads to no responsibility, and the motive of the trustee is obviously vexatious; (c) and they may be decreed even to *pay* the costs of the suit, if they have acted fraudulently, even though the testator directed that the costs should be paid out of the estate; (d) or are decreed to pay interest on account of a breach of trust, (e) or where their negligence occasioned a loss, although no corrupt motives be imputed to them; (f) or where they set up a very improper defence. (g)

It is also a general rule, that if, in a bill for a legacy, the suit is rendered necessary by the ambiguity in the will, or for the security of the legacy, it being given over, (h) the costs are paid out of the assets of the testator. (i) But if the fund in

(a) *Rashby v. Masters*, 1 Ves. J. 205. 581. Sed vide *Ashburnham v. Thompson*, 13 Ves. 404.

(b) *O'Callaghan v. Cooper*, 5 Ves. 128. (f) *Caffrey v. Darby*, 6 Ves. 488.

(c) *Ibid.* (g) *Loyd v. Spillet*, 3 P. W. 347.

(d) *Hyde v. Haywood*, 2 Atk. 125; *Crackelt v. Betune*, 1 Jac. and Walk. 586. (h) *Studholme v. Hodgson*, *ibid.* 303.

(e) *Sheers v. Hind*, 1 Ves. J. 294; *Mosley v. Ward*, 11 Ves. 572. (i) *Jenour v. Jenour*, 10 Ves.

question has been separated from the residue of the testator's personal estate, and placed in the hands of the trustees of such fund, and the question does not arise between an individual legatee and the person entitled to the residue, but between different persons claiming the particular legacy, the costs are not to be paid out of the testator's general estate, but out of the fund in dispute. (a) In a bill by one residuary legatee against another, if the plaintiff assigns his interest, &c., by which a supplemental suit becomes necessary, the costs of it will be borne by the plaintiff's share of the residue; the other costs will be paid out of the residue. (b) It is also to be observed, that if a bill for the payment of a legacy be dismissed, the plaintiff will not be entitled to have his costs paid out of the testator's estate, notwithstanding there is ambiguity in the will. (c)

It is likewise a rule, that a mortgagee, whether a plaintiff in a bill of foreclosure, or a defendant in a bill to redeem, shall have his costs; (d) and the mortgagor must pay the costs of all persons claiming under the mortgagee. (e) But there are

(a) *Jenour v. Jenour*, 10 Ves. 562.

(b) *Brace v. Ormond*, 2 Jac. and Walk. 435.

(c) *Lister v. Sherningham*, in the Exchequer, Hil., 1816.

(d) ——— v. *Threcothick*, 2 Ves. and B. 181.

(e) *Wetherell v. Collins*, 3 Mad. 255.

exceptions to this rule ; for if the mortgagee sets up an unjust defence, he will not be allowed his costs occasioned by it. (a) And there are cases where he will be made to pay costs ; as where there is an actual tender made of principal and interest before the filing of the bill. (b) So, if a bill is filed against a defendant, who is a solicitor and agent, taking securities for what is due for his bill, without settlement of accounts, and, after great delay and expensive litigation, his demand is reduced to more than one-sixth, the costs of the enquiry will be paid by him. (c) Also, if the mortgagee resists the right of redemption, on the ground of a decree of foreclosure collusively obtained by him, he will be decreed to pay so much of the costs, as were occasioned by his resistance. (d)

In a bill to perpetuate testimony, the defendant shall have his costs, if he does nothing more than cross-examine the witnesses ; if he examines a witness in chief, he will not. He is entitled to an order for the payment of his costs immediately after the commission is executed, upon the allegation that he has not examined any witnesses. (e)

(a) *Mocatta v. Murgatroyd*,
1 P. W. 395 ; ——— v. *Thre-*
cothick, 2 Ves. and B. 181.

(b) *Vide Gammon v. Stone*,
1 Ves. 339 ; *Detillin v. Gale*, 7
Ves. 586.

(c) *Detillin v. Gale*, 7 Ves.
584.

(d) *Harvey v. Tebbutt*, 1
Jac. and Walk. 197.

(e) *Foulds v. Midgley*, 1 Ves.
and B. 138.

Costs.

When a cause is brought to a hearing, if the law has an issue directed to try the will, he will be entitled to his costs, although the will is disapproved; as he has a right to be satisfied how his estate is disposed of. (a) But if he sets up insanity, or any other disability against the person, who is executor of the will, and fails, he shall not have his costs. (b) But still the court will not give costs against him. (c) But if the heir is plaintiff in a bill to try the will, and fails, the same rule, with respect to costs, applies to him, as to any other suitor. (d)

In a bill merely for a discovery, the defendant shall not have his costs, to which he is entitled after

application for them is not to be made, till after the return of the commission; but he will not be entitled to the costs of the commission, if he has examined witnesses in chief, instead of confining himself to cross-examination. (a) The defendant is not entitled to move, as of course, for his costs, upon the ground that, although the bill prayed for relief against others, it was merely for discovery as to him. (b) The defendant will likewise be entitled to the costs, which he has incurred in resisting motions made by the plaintiff in the cause, viz., a motion to stay trial, a motion for commission for the examination of witnesses abroad, a motion for the production of books, &c., mentioned in defendant's answer. (c)

In a suit for a partition, though the rule formerly seems to have been that the expense of executing the commission should be borne by the parties equally, without reference to the inequality of their interest, (d) yet the rule now is, that such expense should be borne by the parties, in proportion to their respective interests. (e) If the defendant, in a suit for a partition and an account,

(a) Anonymous, 8 Ves. 69 and 70.

(d) Nevis v. Levene, cited in Ambl. 237.

(b) Attorney General v. Burch, 4 Mad. 178.

(e) Calmady v. Calmady, 2 Ves. J. 568; Agar v. Fairfax,

(c) Noble v. Garland, 1 Mad. 344.

17 Ves. 533.

Costs.

who properly disputes the plaintiff's title, he will be ordered to pay so much of the costs as related to the account, and to the proof of the plaintiff's title. (a) But in a suit to settle the boundaries, between separate freehold and copyhold estates, the costs will be borne equally; for it is possible, and probable, that the confusion might arise from the plaintiff's estate of less value. (b)

In cases where there is an apportionment of land by commission, not by writ, costs are not given, unless previous questions are raised, the litigation of which the party is vexed. (c)

succeeds will have the costs over against the defendant who fails. (*a*) The court will likewise sometimes direct the latter to pay the other defendant his own costs. (*b*)

Where a charity information is filed, under 59 Geo. III. c. 91, without a relator, the court has jurisdiction to order the defendant to pay the Attorney General his costs. (*c*) The Attorney General constantly receives costs, where he is made a defendant in respect of legacies given to charities; (*d*) and even where he is made a defendant in respect of the immediate rights of the crown, in cases of intestacy. (*e*)

In general, it is referred to a Master to report whether proceedings are regular; and if he reports them irregular, and, upon exceptions to the report, the court thinks them regular, yet the court will not give costs, as the reference to the Master was not vexatious. (*f*)

(*a*) *Hendry v. Key*, 1 Dick. 394. *Sed vide* *Beam. Costs*, 291. 83, note 2.

(*b*) *Hendry v. Key*, 1 Dick. 291; *Cowton v. Williams*, 9 Ves. 207. *Sed vide* (*d*) *See* 1 Sim. and Stu. 397.

Dowson v. Hardcastle, 1 Ves. J. 368. (*e*) *Attorney General v. Earl of Ashburnham*, 1 Sim. and Stu. 397.

(*c*) *Attorney General v. Earl of Ashburnham*, 1 Sim. and Stu. (*f*) *Anonymous*, 3 Atk. 234.

Costs.

h respect to the costs of motions, the court or refuses them, with or without costs, as ks just. But if the court gives no directions he costs, the following are the rules on the on, whether they shall be costs in the cause, arty to whom costs of suit were given upon aring. 1st, That the party making a suc- motion, is entitled to his costs as costs cause; but the party opposing it, is not d to his costs, as costs in the cause. That the party making a motion which s not entitled to his costs as costs in the but the party opposing it, is entitled to ts, as costs in the cause. 3rd, That where

the costs to be paid by the unsuccessful party making the motion. (a)

It will be proper, also, to say a few words upon the apportionment of costs. In the sound exercise of the discretion with which the court is invested, it will, as justice requires, either apportion the costs between different parties, or throw them upon particular estates or funds. (b) But it seems that the court will not apportion them after a general decree for costs. (c) But it is laid down by Mr. Fowler, in his *Exchequer Practice*, that where costs are decreed to a plaintiff generally, and to be paid by the defendants generally, each defendant being liable to pay them, the plaintiff may demand and recover the whole from any one of them; and if one defendant pays the costs for himself and his co-defendants, and they refuse to reimburse him, the court will, upon application, order them to contribute their proportions. (d) Under a joint order for costs, one party absconded, and was never served; but it was held that a proceeding by the parties in possession of the order against the other party remaining here, was good, the Lord Chancellor

(a) *Marsack v. Reeves*, 6 Mad. 108.

(b) *Basevi v. Serra*, 14 Ves. 313; 3 Mer. 674; *Seacroft v. Maynard*, 1 Ves. J. 279; *Stone v. Medcraft*, 1 Bro. C. C. 265.

(c) *Michel v. Bullen*, 6 Price, 87. See *ex-parte Bishop*, 8 Ves. 33.

(d) 2 Fowl. Pract. 355, edit. 1795.

Costs.

clearly of opinion that they might proceed
t both or either. (a)

proceed now to remark, that there is a
ption of persons, viz., *paupers*, who are
d to prosecute and defend their rights in
ourt, without incurring the same measure of
which falls upon suitors in general, and who
titled to this privilege, not from any legis-
provision, as plaintiffs paupers are at law, (b)
om the humanity of the court itself. A
r, in the eye of this court, is a person who
himself swear (the affidavit of a third person
eing sufficient)(c) that he is not worth five
s after all his debts are paid (his wearing

petition to the Master of the Rolls, with the necessary affidavits annexed to it, supported, if he is plaintiff, by a certificate under counsel's hand, (a) that he has just cause of suit, but if he be a defendant, without any certificate, (b) obtain an order admitting him to sue, or defend in *forma pauperis*, and assigning him counsel and a six clerk; (c) and the plaintiff may procure this order before or after bill filed; and it is said, in the latter case, no certificate is necessary. (d) A solicitor acting under this order, cannot maintain an action for recovering a bill of fees, for soliciting in a pauper cause in Chancery. (e) According to an old order, (f) the counsel who shall move for a pauper, ought to have the order of admittance with him, and first to move the same before any other motion.

A person ordered to be examined *pro interesse suo*, is permitted to prosecute and make out his right, (g) and a bankrupt is allowed to petition against the commission, (h) in *forma pauperis*;

(a) Harr. Cha. Pract. 390; Sed vide Harr. Cha. Pract. but the order of 1623, Beam. 390.

Cha. Ord. 50, requires such certificate from the Master.

(e) Phillip v. Baker, 1 Turn. Pract. 180.

(b) Harr. Cha. Pract. 1808, p. 390.

(f) Beam. Cha. Ord. 217.

(c) Beam. Cha. Ord. 215.

(g) Bedford v. Leigh, 2 Dick. 708.

(d) Wy. Pract. Reg. 319.

(h) Meadows v. Parry, 1 Ves. and B. 124.

Costs.

An appeal may be prosecuted in that charac-

(a) Where an issue is directed out of Chancery in a pauper's suit, he must be admitted as a party in the court, in which the issue is to be tried, and cannot otherwise proceed in it as a party. (b) And it is proper to add, that the privilege of suing as a pauper, extends only to persons in their own right, and not as executors and administrators. (c)

Under the above order of admittance, no fee, or reward, shall be taken of such party, by the counsellor or attorney, nor any contract or agreement be made for any recompense or reward on account of the disbursement of the

does not discharge himself of costs, to which he was liable in the cause precedent to the order.(a)

A pauper, after his admittance, may be dispaupered, if he gives any fees or reward, or makes any contract for subsequent recompense or reward, or shall settle or contract for the benefit of the suit, or any part thereof, while the same is depending, and in that case the cause may be dismissed ;(b) or if it can be made to appear, that he is possessed of such property, that he ought not to be in *forma pauperis*, as where he is in possession, and receives the rents of the lands in question, although the defendant has a verdict at law, and may thereupon take a writ of possession.(c) But a charitable subscription raised for him, to enable him to carry on the suit, is not a ground of dispaupering him ;(d) nor improper or vexatious conduct by him in a former suit against the same party.(e) But if a pauper is guilty of scandal in his bill or answer,(f) he shall pay the costs of having the same expunged ; so, he cannot dismiss his bill without payment of costs.(g)

(a) Mos. 68 ; Wilkinson v. Belsher, 2 Bro. C. C. 272.

(b) Beam. Cha. Ord. 216.

(c) Harr. Cha. Pract. 1808, p. 390.

(d) Corbett v. Corbett, 16 Ves. 407.

(e) Corbett v. Corbett, 16 Ves. 407.

(f) Toth. 237 ; Rattray v. George, 16 Ves. 232.

(g) Pearson v. Belcher, 3 Bro. C. C. 87 ; Wy. Pract. Reg. 321.

Costs.

ough, if a cause goes against a pauper, he not pay costs to the successful party, yet if succeeds, there are cases where the court has ordered his costs to be taxed, as the costs of a party not in *forma pauperis*; (*a*) as where a plea or answer to a bill by a pauper is overruled; (*b*) for which he is at no costs, or but small costs, yet the counsel or solicitor do not give their labour to the adversary, but to the pauper. However, in another and a subsequent case, (*c*) where the pauper, plaintiff, succeeded, the court would not order him to receive more than he and his solicitor were out of pocket; and in another case, (*d*) where the defendant being pauper, the bill was

Formerly, no process of contempt at a pauper's suit, was to be sent to be sealed, until signed by the six clerk, who was to see that it should not be vexatious or needless ; but this is now disused. However, the order of admission is usually produced in the office, where the pauper has occasion to pass. (a) The court will not, except under very special circumstances, order an advance to be made to a party out of a fund in court, to which he claims title, to defray the expense of the suit. (b) And in a very late case, (c) the court refused to do it, the Vice Chancellor saying, that Lord Eldon had expressed himself dissatisfied with his order, in *Cockerel v. Barber*, by which he had directed such an advance to be made.

I shall now proceed to consider, to what costs the parties in a cause are respectively entitled ; and the means of recovering them ; first, as between party and party ; and, secondly, as between solicitor and client ; with the measures to be pursued by the latter for taxing them.

In some instances, the amount of costs is ascertained by the rule or practice of the court : thus, where the Master reports the answer in-

(a) *Harr. Cha. Pract.* 1808, 4 *Mad.* 172 ; *Cockerel v. Barber*, cited in 2 *Sim.* 40.
p. 390.

(b) *Tillotson v. Hargreaves*, (c) *Peck v. Beechey*, 2 *Sim.* 40.

Costs.

ent, or overrules the exceptions to it, (a) plaintiff in the one case, and the defendant in the other, is entitled to forty shillings in a cause, and to fifty shillings costs in a counter-claim. If the defendant submits to answer, he is entitled to twenty shillings costs. (b)

By the Order of the 21st of July, 1710, (c) it is ordered that the money to be deposited on filing exceptions with the register shall be 5*l*. And by the General Order of the 9th of February, 1721, (d) every exception to the report which shall be judged as frivolous and impertinent, the exceptor shall pay the other side 20*s*. costs; and every exception, or branch of such exception,

shall direct. (a) Costs beyond the deposit were given, where the form of the exceptions was general, which, though regular, was not to be encouraged. (b) If the exceptions are allowed, the deposit is returned to the exceptant.

In the cases of allowing or overruling a plea, or demurrer, the costs were settled at five pounds, but with a power in the court to award further costs. (c) And by the 31st of the General Orders of 1828, upon the allowance of any plea or demurrer, the plaintiff or plaintiffs shall pay to the defendant or defendants the taxed costs thereof; and when such plea or demurrer is to the whole bill, then the further taxed costs of the suit also; unless in the case of a plea, the plaintiff or plaintiffs shall undertake to reply thereto, and then the costs shall be reserved; or unless the court shall think fit to make other order to the contrary. And by the 32nd of the same Orders, upon the overruling of any plea or demurrer, the defendant or defendants shall pay to the plaintiff or plaintiffs the taxed costs occasioned thereby, unless the court shall make other order to the contrary.

(a) *Dawson v. Busk*, 2 Mad. 184, and the cases there cited.

(b) *Purcell v. M'Namara*, 12 Ves. 166; vide 1 Turn. Cha. Pract. 328.

(c) *Beam. Cha. Ord.* 456, 4 Bro. C. C. 545. Vide *Griffith v. Wood*, 1 Ves. and B. 307; and cases in *Beam. Cha. Ord.* 457, in note.

Costs.

usual term of the order, under Lord
n's General Order, when full costs were
on the allowance of a demurrer, was, that
aintiff do pay to the defendant, the costs
demurrer, beyond the 5*l.* to be taxed ;
urt adhered to that form, (*a*) and refused
ect the payment of the full costs of the
On an allowance of a demurrer to an
ed bill, full costs were given. (*b*) And
demurrer allowed to a bill for a com-
n to examine witnesses *de bene esse*, the
f having, on an ex-parte application, ob-
an order to examine the witnesses, was
l to pay to the defendant, besides the usual
f the demurrer, the costs of the depositions.

funded. (a) On re-arguing a plea or demurrer, there was a deposit of five pounds, with a like power to give further costs. (b) If a defendant cannot sustain a demurrer in the record, he is entitled to demur *ore tenus*; but availing himself of that right, he must pay the costs of the demurrer on the record, although the bill in respect of that particular so newly alleged, shall be dismissed by the court. (c) But Mr. Beames observes, that the practice seems to have prevailed, of refusing costs to either party, upon allowing demurrer *ore tenus*. (d)

By the Orders of the 30th April, 1700, (e) and 7th February, 1794, (f) it was requisite that a party appealing from a decree, or, after a hearing, obtaining a rehearing of any cause, or a rehearing of any exception, should, upon rehearing of any cause, deposit in the hands of the register the sum of ten pounds, and upon the rehearing of any exception, the sum of five pounds, to be paid to

(a) *Oats v. Chapman*, 1 P. W. 371; and *Broderip v. Dick*. 148. Phillips, in Mr. Raithby's edit.

(b) Ord. Cha. in 4 Bro. C. C. of Vern. Rep. 1 vol. 78.

545. (d) See Beam. Costs, 223

(c) Beam. Cha. Ord. 174. and 224.

Durdant v. Redman, 1 Vern. (e) Beam. Cha. Ord. 314.
78; *Attorney General v. Brown*, See the note in Beam. Cha.
1 Swanst. 288. Sed vide the Ord. 266.

note in *Tourton v. Flower*, 3 (f) Beam. Cha. Ord. 458.

Costs.

adverse party, where the decree or former was not varied in some material point ; and at case, the party appealing, or obtaining rehearing, besides such deposit, shall also be to pay such further costs as the court may fit. (a) But by the 42nd of the General of 1828, the deposit upon every petition appeal or rehearing is increased to twenty dollars, to be paid to the adverse party, when decree or order appealed from is not varied by material point, together with the further costs occasioned by the appeal or rehearing, as the court shall otherwise order. If a bill dismissed with costs, and the plaintiff applies

sion to be either with forty shillings costs, to be taxed by the Master, or without costs, as the court, upon the nature and merits of the case shall think fit. (a) Thus, if the defendant denies all the equity of the plaintiff's bill, and the cause is heard on bill and answer only, the bill will be dismissed with costs to be taxed. (b)

In some cases, the court has been in the habit of giving costs beyond the taxed costs ; thus, in charity cases, the court often directs extra costs to be taxed for the relators, because otherwise, people would not come forward to file informations ; (c) and it seems that the next friend of an infant will be entitled to fair expenses, beyond taxed costs under the head of just allowances. (d) So, where a trustee has expended money in the fair execution of his trust, by taking opinions, and procuring directions, that are necessary for the due execution of his trust, he is entitled, not only to his costs, but also to his charges and expenses, under the title of just allowances ; but where the court orders the costs of the trustee to be taxed, that means between party and party, not as be-

(a) Vide Ord. Cha. in 2 Atk. 288 ; Beam. 450.

(b) Johnson v. Brown, 3 Atk. 1 ; Mansell v. Bowles, 1 Bro. C. C. 403.

(c) Osborne v. Denne, 7 Ves. 425 ; Currie v. Pye, 17 Ves.

462.

(d) Fearn v. Young, 10 Ves. 184. Sed vide Osborne v. Denne, 7 Ves. 424.

Costs.

attorney and client. (a) In a case between
ns, where the costs come out of the estate,
ourt has directed the costs to be taken as
en solicitor and client. (b) But in a case
one residuary legatee was plaintiff, and the
defendant, where the extra costs of the
ff were much heavier than those of the de-
nt, the court would not give the costs out of
nd in court, as between solicitor and client,
at the defendant's consent. (c) In a suit
t a defendant, an attorney, praying that his
costs on the plaintiff might be taxed, the
of taxation, as between solicitor and client,
t apply when the attorney and client appear

solicitor's bill of costs, either between party and party, or between solicitor and client, whether such separate answers or other proceedings were necessary or proper ; and if he is of opinion that any part of the costs occasioned thereby has been unnecessarily or improperly incurred, the same shall be disallowed. And by the 77th of the same Orders, whenever, in any proceeding before a Master, the same solicitor is employed for two or more parties, such Master may, at his discretion, require that any of the said parties shall be represented before him by a distinct solicitor, and may refuse to proceed, until such party is so represented.

It was formerly the practice of the court, in cases of notorious fraud, to make the defendant pay exemplary costs ; but it has been disused for a considerable time, from the difficulty of carrying it into execution. It appears to have been discontinued even before Lord Hardwicke's time. (a)

Where the court orders or decrees the costs of a party to be taxed, and to be paid by another party, the clerk in court, or solicitor of the former,

(a) *Waltham v. Broughton*, 2 Atk. 43. Note. By the 54th of Lord Bacon's Orders, Beam. Cha. Orders 24, in all suits where it shall appear on the hearing of the cause, that the plaintiff had not *probabilem causam litigandi*, he shall pay unto the defendant his utmost costs, to be assessed by the court.

Costs.

rs a bill thereof to the Master, who is to tax and who furnishes the other side with a of the charges (if desired); and, on request, he a summons for the parties to attend him at ain time, and so from time to time, till the costs are taxed. After the costs are taxed e Master, he certifies the *quantum* to the which certificate being filed, and an office of it produced to the clerk of the *subpœna* and a *præcipe* for a *subpœna* left with him, he a *subpœna*, commanding the party to pay them person entitled to receive them, or bearer; not paid, on personal service and demand, on an affidavit of such service, demand, re-

that leaving it with his clerk in court, or as the court shall otherwise direct (as at his last place of abode), shall be good service. (a)

Where the party is entitled to costs, without any order for that purpose, as in the above case of an answer reported insufficient, the next step after *subpoena* for costs, is an attachment, and so on to a sequestration. The sheriff cannot take bail on an attachment for non-payment of costs ; (b) and if he permits the party to go abroad, the court will order the sheriff to pay the costs. (c)

In order to prevent the defendant from being defeated in his right to his costs against the plaintiff, it is a rule, that if the plaintiff is resident abroad (and if plaintiff is resident in Ireland, he is considered for this purpose as resident abroad), (d) the court will, on the application of the defendant, order the plaintiff to give security for the costs of the suit, and in the mean time all proceedings to be stayed ; (e) and a previous application to the plaintiff's solicitor for such security, is not necessary. (f) But the circumstance of the plaintiff

(a) Beam. Cha. Ord. 173 ; (d) Hill v. Reardon, 6 Mad. Wy. Pract. Reg. 406 ; Tyssen 46.

v. Ward, 1 Dick 166.

(e) Wy. Pract. Reg. 146.

(b) Anonymous, Pre. Cha. 331.

(f) Baile v. De Bernales, 1 Barn. and Alder. 331.

(c) Anonymous, 11 Ves. 170.

Costs.

imprisoned under sentence for transportation or a misdemeanor only, will not entitle the plaintiff to call for this security. (a) If the order for security for costs should be given before the defendant should be obliged to answer, the plaintiff may obtain an order to examine old witnesses, though he has not given the security. (b) If the defendant neglects to comply with the order for the security, the court will then order, that unless he give the security within a given time, his bill be dismissed. (c) If there are co-plaintiffs residing abroad, the court will not order a plaintiff residing abroad to give this security; for the defendant is security for his costs against each of the plaintiffs. (d)

but if the defendant is, at the time this step is taken, ignorant of the above fact, he may obtain the security in any stage of the cause, as soon as it comes to his knowledge. (a) And if the plaintiff goes abroad after answer, with the intention of residing, and being domiciled there, a security for costs will be required ; as well as in the ordinary case, where he is abroad on filing the bill. (b) But the mere fact that the plaintiff is going abroad, or the statement of the plaintiff in his bill, that he is on a voyage to New York, is not sufficient to induce the court to receive this security. (c) Neither will it be sufficient that the plaintiff has actually left the kingdom, unless also it appears he had done so to settle abroad, (d) much less, if it appears that he intends to return to this country. (e) If the plaintiff is a consul abroad, he will not be ordered to give this security, as he is considered in the same light as a land or sea officer in the service of his majesty. (f)

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| (a) <i>Meliorucchy v. Meliorucchy</i> , 2 Ves. 24 ; <i>Lonergan v. Rokeby</i> , 2 Dick. 799. | head, 15 Ves. 2 ; <i>Green v. Charnock</i> , 2 Cox, 284. |
| (b) <i>Weeks v. Cole</i> , 14 Ves. 518. | (d) <i>Anon.</i> 2 Dick. 775. |
| (c) <i>Hoby v. Hitchcock</i> , 5 Ves. 699 ; <i>White v. Great-</i> | (e) <i>White v. Greathead</i> , 15 Ves. 3. |
| | (f) <i>Colebrook v. Jones</i> , 1 Dick. 154. |

Costs.

where a plaintiff carried on business abroad, and no permanent residence in England, but in England at the time of bringing the action, and it was sworn that he had no intention of leaving the country, this is no sufficient answer to an application for security for costs, inasmuch as it was not distinctly sworn that he resided, or intended to continue to reside, here. (a) If, on a decree, the plaintiff is at liberty to bring an action at law, and he is abroad, he must give security for costs, according to the course of practice of the court in which the action is brought. (b) It may be proper likewise to add, that a *cestuique* trust brings an action in his

should give an adequate security for costs. (a) But now, by the 40th of the General Orders of 1828, the penal sum in the bond to be given as a security to answer costs by any plaintiff, who is out of the jurisdiction of the court, is increased from forty pounds to one hundred pounds. Where there are different defendants who appear by separate clerks in court, the plaintiff is to give separate bonds to each defendant, but they all form a security for one sum of 40*l.* (now 100*l.*) only. (b)

To prevent a party from being harassed by a second litigation, upon the same question, by the same party, this court will, if, after a suit here has been dismissed by default, or after a demurrer has been allowed in the Court of Exchequer, the same plaintiff files another bill in this court for the same matter, stay proceedings in the second suit, till the costs of the former suit are paid. (c) But the court refused to do this, where the former proceedings were in the Ecclesiastical Court, and at law; and where questions arose in the Chancery suit, which were not in issue in the suit in the Ecclesiastical Court, and where the discovery to be obtained from the defendant's answer

(a) *Gage v. Lady Stafford*,
2 Ves. 557.

(b) *Lowndes v. Robertson*,
4 Mad. 465.

(c) *Pickett v. Loggon*, 5 Ves.
706 ; *Holbrooke v. Cecraft*, in
note to that case.

Costs.

be material. (a) So, where a defendant obtains an order to dissolve an injunction for want of proof, having made two previous motions for the purpose, which had been refused with costs, and the costs not paid, the court discharged the first-mentioned order, the defendant not appearing. (b)

Before we quit the subject of costs between party and party, it is proper to observe, that the decree directs a person personally to pay the costs, and nothing further is left to be done; and such party afterwards dies before the decree is paid, the right to the costs dies with him; and it cannot be revived for costs alone; (c) but

in these cases the suit may be revived for costs; and in the case of cross suits, if the court has given the defendant in the original bill his costs for that suit, but his cross bill is dismissed with costs, and he afterwards dies before taxation, his death will not prevent the costs which he was to pay on account of the cross bill, from being deducted out of what he was to receive, on account of the costs upon the original suit. (a) It seems to have been the opinion of Lord Rosslyn, that where the party, who is to *receive* the costs, dies, his representative was entitled to revive for costs alone, although such death happened before the taxation, and although they were not to be paid out of a particular fund. (b) But it has been since held, that costs in equity are lost, as well by the death of the party to *receive* as that of the party to pay, before taxation. (c) If his death happens after taxation, it seems that his personal representative may obtain payment of costs by *subpœna scire facias*, though the decree or order be not signed and enrolled. (d) And if a female plaintiff, who by the decree is entitled to costs, marries after the decree is signed and enrolled, but before the taxation of costs, the suit may be

(a) *Kemp v. Mackrell*, 3 Atk. 811, 2 Ves. 580. S. C.

(c) *Japp v. Geering*, 5 Mad. 375.

(b) *Morgan v. Scudamore*, 3 Ves. 195. Sed vide *Glenham v. Statwell*, 1 Dick. 14.

(d) In the Exchequer Sittings after Trin. T. 1814, and 2 Fowl. 498.

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by a *subpœna scire facias*. (a) But it is here to add, that if the person who is to costs, is already in custody for the non-payment of them, and then the party to receive dies, the court will order that, unless the person is revived within a reasonable time by the representative of the party dying, the person in custody shall be discharged; (b) for the process which he is in custody is for a contempt, and that process must die with the person. (c)

respect to costs as between solicitor and client, the former may maintain an action against the latter for the recovery of his costs. (d) But by statute 3rd of James I. c. 7. s. 1. "all

attorneys in inferior courts, but only to those in the courts at Westminster. (a) It should seem also, that an attorney's bill could not have been taxed, unless an action was depending thereon, nor without bringing the amount of it into court. (b) To remedy these inconveniences, it was enacted by the statute of 2nd Geo. II. c. 23, s. 23, made perpetual by the 30th Geo. II. c. 19, s. 75, that no attorney of the Court of King's Bench, Common Pleas, or Exchequer, nor any solicitor in Chancery, &c., shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements at law, or in equity, until the expiration of one month or more after such attorney or solicitor respectively shall have delivered unto the party or parties to be charged therewith, or left for him, her, or them, at his, her, or their dwelling-house, or last place of abode, a bill of such fees, charges, or disbursements, written in a common, legible hand, and in the English tongue, except law-terms and names of writs, and in words at length, except times and sums; which bill shall be subscribed with the proper hand of such attorney or solicitor respectively. And upon application of the party or parties chargeable by such bill, or of any other

(a) Carth. 147; 1 Show, 96;
Brokenhead v. Fanshaw, 1 Salk.
86.

(b) Vide Tidd. 2 Vol. 680.

Costs.

in that behalf authorised, unto the Lord Chancellor, or Master of the Rolls, or unto the courts aforesaid, or unto a Judge or of any of the said courts respectively, in the business contained in such bill, or the part thereof, in amount or value, shall be transacted, and upon the submission of the party or parties, or such other person as aforesaid, to pay the whole sum upon taxation of the said bill, shall appear due to the said attorney or solicitor respectively shall and may be lawful for the said Lord Chancellor, Master of the Rolls, or any of the aforesaid, or for any Judge or Baron of any said courts respectively; and they are

shall forthwith pay to the said attorney or solicitor respectively, or to any person by him authorised to receive the same, that shall be present at the said taxation, or otherwise unto such other person or persons, or in such manner as the respective courts aforesaid shall direct, the whole sum that shall be found to be or remain due thereon; which payment should be a full discharge of the said bill and demand, and in default thereof, the said party or parties shall be liable to an attachment or process of contempt, or to such other proceedings, at the election of the said attorney or solicitor, as such party or parties was or were before liable to. And if, upon the said taxation and settlement, it shall be found that such attorney or solicitor shall happen to have been overpaid, then the said attorney or solicitor respectively shall forthwith refund and pay unto the party or parties thereto, or to any person by him, her, or them, authorised to receive the same, if present at the settling thereof, or otherwise, unto such other person or persons, or in such manner as the respective courts aforesaid shall direct, all such money as the said officer shall certify to have been overpaid, and in default thereof, the said attorney or solicitor respectively shall, in like manner, be liable to an attachment or process of contempt, or to such other proceedings, at the election of the said party or parties, as he would have been subject unto, if this act had not been

Costs.

And the said respective courts are hereby
ised to award the costs of such taxation, to
d by the party or parties, according to the
of the taxation of the bill, that is to say, if
ill taxed be less, by a sixth part, than
ll delivered, then the attorney or solicitor
pay the costs of the taxation; but if it
not be less, the court, at their discretion,
charge the attorney, or client, in regard
e reasonableness or unreasonableness of
bill.

by the 12th Geo. II. c. 13, s. 5, it shall be
to and for every attorney, clerk in court, or
to write his bill of fees, charges, and dis

It is to be observed, that the jurisdiction of the courts *under this act* of 2 Geo. II, c. 23, to direct a taxation, is confined to the case, where the bill has been previously delivered. By the statute, no attorney or solicitor can commence an action until he has delivered a bill, properly subscribed ; and upon the application of the party chargeable by such bill, that is, the bill so delivered, a taxation may be directed. Mr. Beames, in his book on Costs, p. 265, observes, that it may probably be successfully contended, that the courts, under their *general* jurisdiction over attorneys and solicitors, as their officers, have the power to compel a delivery of the bill ; and the bill being once delivered, the statutory jurisdiction applies, to enable such courts to direct taxation. At law, there are two distinct applications ; the first for the delivery of the bill, the second for the taxation. (a) Mr. Beames, p. 266, then observes, that this distinction has not, as he apprehends, been regarded in courts of equity ; it is, on the contrary, the daily practice of such courts, in one and the same order, to direct a solicitor to deliver his bill, and to refer that bill to be taxed, the party applying, undertaking, in conformity with the statute, to pay what shall be found due on taxation.

(a) *Cowper v. Milburn*, Barnes, 126 ; and 2 *Hullock*, 513.

Costs.

the whole bill be for conveyancing, it cannot be taxed; (a) but if the bill be for conveyancing, parliamentary business, or for fees paid to a solicitor for business done in the Ecclesiastical Court, and likewise for fees and disbursements in the Court of Chancery, the Master may tax the whole. (b) And if a solicitor delivers two separate bills, one for fees and disbursements in causes, and the other for making conveyances, both may be taxed. (c) And it may not be necessary to remark, that Lord Tenterden (d) has said that if an attorney is employed in a matter wholly unconnected with his professional character, the court will not interfere to compel him to execute faithfully the trust imposed in him.

the costs of the other court, to the proper officers of that court for their taxation, and which is returned into the Master's office. (*a*) The taxation of agency bills falls within the act of parliament, (*b*) although Lord Hardwicke seems to have entertained a contrary opinion. (*c*) The costs of proceedings before the Lord Chancellor, as exercising a visitorial power under a royal foundation, (*d*) or of soliciting a bill in parliament, (*e*) or the costs of a solicitor's bill, for business done in a cause, in the Court of Great Sessions, in Wales, where there is nothing beyond the costs in dispute, (*f*) are not within this statute. But where there is a detention of title-deeds by the solicitor, and a lien is claimed by him for his costs, the court may refer those costs to be taxed, though the business be done in the Court of Great Sessions. (*g*) Commissioners of charitable uses have no power, under the 43rd Eliz. c. 4, to give costs. (*h*) But the Lord Chancellor, on exceptions to the decree made by the commissioners, may award costs. (*i*) A court of law will

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| (<i>a</i>) 1 Turn. Cha. Pract. 412. | (<i>f</i>) Ex-parte Partridge, 2 |
| (<i>b</i>) Ex-parte Bearcroft, 1 | Mer. 500; 3 Swanst. 398, S. C. |
| Dougl. 200, in the note. | (<i>g</i>) Ex-parte the Earl of Ux- |
| (<i>c</i>) Binstead v. Barefoot, 1 | bridge, 6 Ves. 425. |
| Dick. 112. | (<i>h</i>) Aylet v. Dodd, 2 Atk. |
| (<i>d</i>) Ex-parte Dann, 9 Ves. | 238. |
| 547. | (<i>i</i>) Ibid. 239; Corporation |
| (<i>e</i>) Ex-parte Wheeler, 3 Ves. | of Burfold v. Lenthall, ibid. |
| and B. 21. | 549. |

Costs.

an attorney's bill, although all the business
ne at the Quarter Sessions. (a) A solicitor's
bankruptcy may be taxed. (b) But it is not
se to refer a bill of costs to the Master, up
choice of assignees, already taxed by the
ssioners; particular objections must be
if the solicitor refuses to give a copy of
a reference will be made. (c)

re the making of the above act of 2 Geo.
party making the application to have his
r's bill taxed, must have brought the whole
l into court. (d)

at his place of abode; for the merely delivering of it into his hands, if he returns it immediately, is not sufficient, though he promise to pay the money. (a) And a delivery at the country house of the defendant, who dwells elsewhere, is not sufficient; (b) nor would it be sufficient to prove that a copy of the bill was shown to the client, and the several charges explained, on which he admitted the debt. (c) But delivery of a bill on an agent appointed to receive it, (d) or to a person appointed attorney in the place of a former attorney discharged, (e) has been held a delivery within the statute. If two persons employ a solicitor, and one of them gives all his directions and orders about the business, a delivery to the person so acting, is sufficient to charge both. (f) But it is not necessary to deliver any bill, where the action is brought by one solicitor against another, though all the business were done before the defendant became a solicitor. (g) So, if an agent to a country solicitor brings an action against his principal, (h) or the executor or administrator of an attorney brings an action for business done by

(a) *Brooks v. Mason*, 1 Hen. Black. 290.

(b) 4 *Espinasse*, 254.

(c) 1 *Campb.* 437.

(d) 2 *Campb.* 277.

(e) *Vincent v. Slaymaker*, 12 *East.* 372.

(f) 2 *Campb.* 277.

(g) *Ford v. Maxwell*, 2 *Hen. Black.* 589.

(h) *Peake's Cases*, 1.

Costs.

ceased, (a) it is not necessary for the plain-
either of the cases, to prove the formal
y of a bill; and if a solicitor himself be
ant, he may set off his demand without
ing his bill; in which case, however, he
deliver his bill, time enough to enable the
ff to get it taxed before trial; (b) before the
g of the above act of parliament, the party
g the application to have his attorney's bill
must have brought the whole demand into
(c) And the statute has been held to ex-
o an agreement between the attorney and
that the former should charge nothing
han the money actually laid out in respect
business, and that an action could not be

to pay what should appear to be due from him on such taxation. If the application to have the solicitor's bill taxed, is made by a party in a cause, the order for that purpose may be entitled in the cause, as it then belongs to the general jurisdiction of the court to make such order. (a) But a person not a party in the cause, must apply *ex-parte* under the statute. But such an irregularity would be waived by proceeding under the order. (b) If the party who obtained the order of reference afterwards dies, his representative cannot revive it, but upon the same terms, viz., the undertaking to pay. (c) If the solicitor dies, the client ought to revive the order on his personal representative, otherwise it is no contempt in the personal representative of the solicitor, to proceed at law against the client. (d) But the court has no jurisdiction to order a solicitor's bill to be taxed, on the application of the solicitor himself; taxation is for the benefit of the client. (e) But the court will make an order, on the application of a solicitor, to tax his own agent's bill. (f) A party who, by agreement, has paid the bill of costs of

(a) *Bignol v. Bignol*, 11 Ves. 328.

(b) *Ibid.*

(c) *Murphy v. Balderston*, 2 Atk. 114.

(d) *Houlditch v. Houlditch*, 1 Swanst. 58.

(e) *Sayers v. Walond*, 1 Sim. and Stu. 97.

(f) *Corner v. Hake*, 2 Cox. 173.

Costs.

er party, cannot apply for a taxation, for
solicitor was not the solicitor of the person
aid the costs. (a)

security obtained whilst the solicitor is doing
ss for his client, or whilst a cause is de-
g, is considered in a court of equity in
a different light than between two common
s; for if a solicitor prevailed on a client to
to an exorbitant reward, the court will
set it aside entirely, or reduce it to the
rd of those fees, to which he is properly
d. (b) But however, if the bill of costs has
ettled and paid, or a judgment obtained for
mand and acquiesced in, the court will not

ferred for a taxation, notwithstanding payment, and vouchers given up, (a) or a release, or a judgment, if the client can, by affidavit, show that the business was never done, or that the charges were fraudulent. (b) But in the absence of any evidence of undue pressure on the feelings of the client, in obtaining a security for the solicitor's costs, and of any material error in the account, the court will not set aside the security, although given whilst the business was depending. (c) But if the settlement takes place, not merely pending the suit, but also in consequence of fear on the part of the client, of being deserted, in case he did not submit to the solicitor's demand, and the client becomes indebted to the solicitor, on a subsequent account in the same suit, the payment of the first bill will not bar a taxation of it. (d) A client who had obtained the common order for taxation upon the usual submission, cannot now say that he has an antecedent demand, and desire to have that deducted out of what was taxed as due to the solicitor; but if there are accounts between them, the client ought to bring a bill

(a) Wy. Pract. Reg. 396 and 397.

(b) Sanderson v. Glass, 2 Atk. 295 and 298; Langstaffe v. Taylor, 14 Ves. 262; Aubrey v. Popkin, 1 Dick. 403, 2 Tidd. 688.

(c) Cooke v. Setree, 1 Ves. and B. 126; Plenderleath v. Fraser, 3 Ves. and B. 174.

(d) Crossley v. Parker, 1 Jac. and Walk. 460.

Costs.

account, praying that the bill might be
(a)

When the client has obtained this order for
costs, a copy of it should be served personally
on the solicitor, and the original order shown to
him. If this order be not obeyed, another order
may be obtained, upon affidavit of service of the
first order and that the first order has not been
obeyed with, that the solicitor should deliver his
costs within a given time, usually four days, or
be committed. If he persists in his disobedience,
an order may be obtained for his commitment
upon an affidavit of the service of the last
order and of his contempt of it. A solicitor.

ceeds to tax the different items in the bill. Charges by a solicitor in the country, for journeys to London, either to attend the hearing of a cause or motion, or on other matters, which may be done by his agent, will not generally be allowed. (a) But they may be allowed in some cases, as it often happens, that causes suffer from being left to agents; the personal attendance of a country solicitor, may, in many instances, have been of great importance; but the mere circumstance of his client sending for him, will not alone be sufficient to entitle him to have these items allowed, as the solicitor must have known, much better than his client, whether the journeys were necessary or not; and if they were not, he ought to have told him so. (b) The general rule of practice, in taxing bills of costs between solicitor and client, is not to allow a solicitor to charge for drawing his bill of fees and disbursements; and upon taxation between solicitor and client, if the discharged solicitor brings a clerk in court to assist him in supporting his bill, the attendance of the clerk in court cannot be allowed, the solicitor in such cases, retains the clerk in court on his own separate account. (c)

(a) Wy. Pract. Reg. 149;
1 Turn. Cha. Pract. 868.

(b) Crossley v. Parker, 1 Jac.
and Walk. 460.

(c) 1 Turn. Cha. Pract. 867.

Costs.

Any part of the bill has been already paid, it is to be shown at the time of the taxation, for if not, it will not make a good payment of part of what is taxed. (a)

If a bill of fees is left, in pursuance of the order at the Master's office, the Master cannot, in the reverse taxation, receive any other bill; he must proceed on the bill so left, unless an order to that effect be so obtained, giving the solicitor or agent liberty to deliver a further bill, which must also be obtained, but under very special circumstances, and upon notice. (b)

The master certifies that a balance is due

If a sixth part of the bill be taken off, the solicitor is to be ordered to pay the costs of the taxation, although the part taken off is just beyond that proportion. (a) By analogy, the same rule is applied to the bill of costs of a solicitor to a commission of bankruptcy taxed by the commissioners. (b) But in taxation of costs, the court cannot make the solicitor pay the costs of taxation, on account of improper conduct, but only, when there are improper items in the bill, amounting to a sixth. (c) And the order is obtained upon a motion of course. (d) But the solicitor may, pending the application for the costs, bring an action for the residue of his bill. (e) But a court of equity will restrain the action, if brought for the whole of the taxed costs, and direct the costs of the taxation of the bill, to be deducted from the amount of the taxed costs. (f) But if a solicitor delivers his bill, and after his death, an application is made to tax it, and above a sixth part is taken off, his personal representative is not liable to pay the costs. (g) If less than a sixth part is taken off, the costs are in the dis-

(a) *Dixon v. Dixon*, 2 Fowl. 464.

(b) *Westall ex-parte*, 3 Ves. and B. 141.

(c) *Yea v. Yea*, 2 Anst. 494. Sed vide *Yea v. Frere*, 14 Ves. 154.

(d) 1 Turn. Cha. Pract. 865.

(e) *Hewith v. Bellott*, 2 Barn. and Alder. 745.

(f) *Ex-parte, Bellott*, 4 Mad. 379.

(g) *Weston v. Pool*, 2 Stra. 1056.

Costs.

of the court. In the exercise of the discretion, however, the court is governed by the facts, and accordingly, the costs of taxation have been always reciprocally given to the attorney &c., and client, as a sixth part has or has not been taken off; (a) and it is a motion of course to obtain the payment of the costs of taxation if less than a sixth has been taken off. (b) Deductions in respect of business done for a person, at the alleged retainer of the client, whose authority not proved, are not computed in the question of the costs of the taxation of the bill. (c) But the court will order the solicitor to pay to his client the costs which have been incurred by the latter, owing to the soli-

costs; and a solicitor will not be allowed to interpose the payment of his bill of costs by a trustee, in a question between himself and the *cestuique trust*, the solicitor having been aware, that the person who paid him was merely a trustee. (a)

It may not be irrelevant here to mention, that by the statute of 43 Geo. III. c. 46, s. 3, wherever a plaintiff shall not recover the amount of the sum for which the defendant was held to bail (without probable cause), the defendant shall be entitled to costs under a rule of court. Upon this clause, it has been held, that if an attorney bring an action for his bill of costs, and hold the defendant to bail for a larger sum than was afterwards found to be due upon taxation, without any reasonable or probable cause, this was a case within the statute. (b)

Whether a solicitor, in addition to the remedies above-mentioned, for his costs, can likewise recover them by a bill in Chancery, appears to be an unsettled point. (c) But it has been decided, that a clerk in court may maintain, not only an action at law, but likewise a bill in Chancery,

(a) *Holland v. Lloyd*, 3 Mer. 285. 1 Vern. 203, and cases cited in *Barker v. Dacie*, 6 Ves. 683;

(b) *Robinson v. Elsam*, 5 Barn. and Alder. 661. *Parry v. Owen*, 3 Atk. 740; see *Spelman v. Woodbine*, 1 Cox.

(c) *Raneleigh v. Thornehill*, 49.

Costs.

at the solicitor who employs him, for the
at of the fees and disbursements ; (a) on the
hand, the solicitor may, upon a summary
ation to the court, obtain an order that
erk in court should deliver in his bill of
and for a reference to the Master to
(b)

have before observed, that the Master's
, or rather certificate of costs, does not
e confirmation ; nor can it be the sub-
exception ; although there are other mat-
n the report, which are made the ground
ception. (c) However, if the decree has di-

To assist the solicitor in the recovery of his costs, he has a lien upon all deeds, papers, and writings of his client, which came to his hands in the course of his professional employment; (a) and this is a general lien, and not limited to the costs attending the particular transaction, on account of which the papers were deposited, unless there be a special agreement for that purpose; (b) but it seems that this lien does not extend to the original will of the deceased client, (c) nor to a case where the papers come into the solicitor's hand, as steward of a manor. (d) And where a deed is sought to be impeached, the plaintiff is entitled to have it produced, and no lien can protect the defendant from producing it; for it is the object of the suit, that the deed may be declared a nullity. (e) An agent in town has a lien upon the papers in his hands, for what is due to him as agent in the cause, from the solicitor in the country, after deducting what has been paid by the client to the solicitor. (f) But if clerk in court

(a) *Stephenson v. Blakelock*,
1 Maule and Sel. 535.

(b) *Ex-parte Sterling*, 16
Ves. 258; *ex-parte Nisbett*, 2
Sch. and Lef. 279; *ex-parte*
Pemberton, 18 Ves. 282.

(c) *Georges v. Georges*, 18
Ves. 294; *Lord v. Wormleigh-*
ton, 1 Jac. 580.

(d) *Champernown v. Scot*, 6
Mad. 93; *Balch v. Simes*, 1
Turn. 87.

(e) *Balch v. Simes*, 1 Turn.
92.

(f) *Ward v. Hepple*, 1
Ves. 297; *Farewell v. Coker*
2 P. W. 460.

Costs.

a solicitor money to carry on a cause, this not entitle the former to detain the papers of the client as a security for the advance. (a) And if a country client employs a country solicitor, and the latter employs a clerk in Chancery, and the client or the country pays his solicitor, but the clerk in court remains unpaid, the client is not bound to pay the clerk in court; (b) but if the latter has the papers in his hands, he may retain them; and if anything remains due in the hands of the counsellor, the court will stop it, and the same shall be paid to the clerk in court. (c) But the court orders a clerk in court with whom exhibits have been deposited, under the usual order, to pay the same to the clerk in court for the

of his costs, (a) unless it should happen, that the securities (being, for example, bills of exchange) should be dishonoured; in which case, the solicitor would be placed in his original situation as to lien. (b)

A solicitor, in general, has a lien for his costs, on the costs taxed for his client; but it often happens that the cause comprises a great number of questions, and costs may be ultimately due to both the contending parties, and sums to be paid as duties to each; in these cases, the demands of both are arranged so as to do justice between them; and the lien of the solicitor is only as to these costs, which upon the whole, taken together, one party can have from the other. (c) The court will not direct the costs of a suit, and of an action between the same parties, to be set off against each other. (d)

A clerk in court has also a general lien on the *duty* recovered by his diligence and expense, which extends as well to collateral proceedings as to a decree. (e) *A solicitor* also has a lien for his fees

(a) *Cowell v. Simpson*, 16 Ves. 275; *Chase v. Westmore*, 5 Maule, and Sel. 180; *Balch v. Simes*, 1 Turn. 87.

(b) *Stephenson v. Blakelock*, 1 Maule, and Sel. 535.

(c) *Taylor v. Popham*, 15 Ves. 72, and *ex-parte Rhoades*, 15 Ves. 539.

(d) *Wright v. Mudie*, 1 Sim. and Stu. 266.

(e) *Anon.* 2 Ves. 25.

Costs.

disbursements, on a sum decreed to his client, and has a right to be paid out of it, in a suit on the client's death, in preference to bond creditors of the client. (a) The solicitor has likewise a lien on the estate recovered by decree, in the hands of the persons recovering it, but if the client should die, the solicitor loses such lien on the estate in the hands of the persons at law, unless it should be necessary to have the decree revived, and then the lien will revive. (b) And where a party had compromised a claim, without the knowledge of his solicitor, and the court ordered part of a sum of money, which had been paid into court in the cause, to be paid to the solicitor to satisfy the solicitor's costs. (c) If

costs on that particular suit. (a) But if the solicitor has in his custody the instrument on which his client's right to the fund rests, he has a general lien on the fund. (b)

' A solicitor, if he does not carry on the cause to a hearing, has no lien for costs, upon a *fund* in court. (c) So, a clerk in court, and solicitor for a defendant, refusing to proceed until his fees are paid, will be ordered to produce an office copy which he made of the bill, to be marked. (d) And if a solicitor *declines* to be further concerned, insisting on retaining the papers of his client till his fees are paid, he must still allow the new solicitor of his client to see them at all reasonable times, and must himself attend with them before the Master, if necessary, or suffer the new solicitor to have them for that purpose. (e) If the client becomes a bankrupt, the solicitor, although not employed by the assignees, is bound to produce, in the Master's

(a) *Lann v. Church*, 4 Mad. 391. Note. The reader will observe the distinction between a lien on a *fund*, and a lien on *papers*. See ante, 643.

(b) *Worral v. Johnson*, 2 Jac. and Walk. 214.

(c) *Creswell v. Byron*, 14 Ves. 271.

(d) *Mayne v. Hawkey*, 3 Swanst. 93; *Merrywether v. Mellish*, 13 Ves. 161 and 165.

(e) *Commerell v. Poyntor*, 1 Swanst. 1; *Moir v. Mudie*, 1 Sim. and Stu. 282.

Costs.

papers of his client, deposited in the solicitor's hands previously to the bankruptcy, with which, the assignees are incapable of proving the bankrupt's discharge in the Master's office; the solicitor is not bound to deliver them up, or to produce them in any other matter. (a) And if the solicitor changes his solicitor, the latter cannot stop the progress of a cause, till he has been paid his bill. (b) But if the solicitor is *discharged* by his client or his representatives, he is not in that case bound to produce the *papers* in his possession for the purposes of the cause, his bill of costs being paid. (c)

It may be here useful to observe, that if a

upon an offer to pay his demand, and on a prayer that he might deliver his bill of fees. (*a*)

Commissioners under a commission of partition, have no lien on the commission for their charges. (*b*)

(*a*) *Ex-parte the Earl of Ux-*
bridge, 16 Ves. 425.

(*b*) *Young v. Sutton*, 2 Ves.
and B. 365.

CHAPTER X.

ADJUDICATION, REVERSAL, AND EXECUTION OF
DECREES.

*Applications to Rectify Minutes, Rehearing; En-
ment; Bill of Review; Appeal to the House of Lords;
Execution of Decrees.*

SECTION I.

Summary Applications to Rectify Minutes. 651

be rectified or supplied, be a mere clerical mistake in the mode of drawing up the decree itself, (a) or errors appearing on the face of schedules to the Master's report, (b) or an omission in a decree in a creditor's bill, to take an account of the personal estate, (c) or a mistake is made by misnaming a defendant, and the Accountant General has, in consequence, entered an account in wrong names, (d) or where, in a decree that the parties should produce before the Master all books, papers, and writings, the usual words, "as the Master should direct," were omitted, (e) the court, in such cases as these, will not put the parties to the expense of a rehearing, but will rectify the decree upon motion. And in the last-mentioned case but one, the court will make a further order, that the Accountant General should alter the account in his books. (f) So, where a direction to examine all parties upon interrogatories was omitted, a supplemental order was made ; (g) and a similar order was made, whereby a mistake in a decree, directing money to be paid in, which had been

(a) Wy. Pract. Reg. 155.

(d) Hawker v. Buncombe, 2

(b) Weston v. Haggerston,

Mad. 391.

Coop. 134.

(e) Punderson v. Dixon, 5

(c) Pickard v. Mattheson, 7

Mad. 121.

Ves. 293, 294; Newhouse v. Mitford, 12 Ves. 456, 457;

(f) Hawker v. Buncombe, 2 Mad. 391.

Gresley v. Adderley, 1 Swanst. 573.

(g) Wallis v. Thomas, 7 Ves. 292.

Summary Applications to Rectify Minutes.

was rectified. (a) It seems that it is a general rule, that an application to rectify an omission from a decree, should be made by petition, in order that the court might have before it all the proceedings in the cause. (b) Even after a decree has been entered, errors, appearing on the face of the decree, have been allowed to be rectified, upon application, without a bill of review; as where it appeared that the Master had carried forward the balance from one schedule to the next, and the balance of that to the following, and so on, through several schedules, but, instead of giving the defendant with the balance only, at the end of the last schedule, which included all the balances, he had cast up all the different

Orders of 1828, clerical mistakes in decrees, or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an enrolment, be corrected upon petition, without the form and expense of a rehearing.

SECTION II.

Rehearing.

There are three modes by which a decree may be reversed : by a rehearing ; by a bill of review ; and by an appeal to the House of Lords. Under the term “rehearing,” I include an appeal from a decree pronounced by the Master of the Rolls, or Vice Chancellor, to the Lord Chancellor ; for this is in strictness a rehearing ; for it is the decree of the latter judge, although made by either of the former.(a) The party who is desirous of rehearing a cause, should take care, as soon as he has received notice of the docket having been presented for the Lord Chancellor’s signature, to enter a *caveat* with the Secretary of Decrees, to prevent it from being enrolled, as the enrolment of it takes away this mode of redress, and leaves the party to

is, within six days after the order pronounced, to prefer his petition to have such minutes rectified.

(a) Note. By 42nd of Lord Bacon’s Orders, Beam. Cha.

Ord. 21, the decrees granted at the Rolls, are to be presented to his Lordship, with the orders whereupon they are drawn, within two or three days after every term.

Rehearing.

er two modes above mentioned. The *caveat* is the decree from being enrolled for twenty-four days, from the time of the docket being sent to the Lord Chancellor for his signature, notice thereof given by his secretary to the other side. (a) And the petition of is considered as answered, on the day when presented, although, in point of fact, it is not till the next day. (b) In strict practice, docket ought not to be presented till after the decree to enrol *nunc pro tunc* has been passed and entered. (c) It seems, that in a decree for an injunction, the court never suffers it to be signed and enrolled, because thereby the hands of the parties would be tied up, if there should have been

consent. (a) If the decree was pronounced by the Lord Chancellor, application must be made to him for a rehearing.

The application, in these cases, is made by petition, stating shortly the circumstances of the case, in what points the decree complained of is erroneous, and the reasons on which the objections are founded. The petition must be signed by two counsel, usually those in the cause, who signify that they conceive there is good cause for the petition. Though it is in the discretion of the court to grant or refuse a rehearing, (b) it is usually granted. But if the petition states a different case from that on which the decree was pronounced, the court will direct that it should be taken off the file. (c) A remainder-man may appeal, or rehear a cause; even creditors, not parties to the suit, but coming in under the decree, may appeal or rehear. (d) And an appeal may be prosecuted in *forma pauperis*. (e)

By the Order of the 9th July, 1725, (f) it is directed, that when any party shall be dissatisfied

(a) Thompson v. Thompson, 10 Ves. 30.

(d) Gifford v. Hort, 1 Sch. and Lef. 409.

(b) Mills v. Banks, 3 P. W. 8; Fox v. Mackreth, Har. Jur. Arg. 451.

(e) Bland v. Lamb, 2 Jac. and Walk. 402.

(c) Wood v. Griffith, 1 Mer. 35.

(f) Beam. Cha. Ord. 336 and 337; and see the Orders of the 5th June, 1725, *ibid*, 334.

Rehearing.

judgment of the court, a petition for the
g is to be presented within a fortnight
order pronounced; and that a petition of
om a decree at the Rolls, shall be present-
n a month after such decree pronounced.
a subsequent Order (a) of the 27th Janu-
6, the time is enlarged to a month in the
ase also; but the court does not appear to
ended to this order. (b) A rehearing has
nted at the distance of two years, at the ap-
of the defendant, against whom a decree
made by default, which was afterwards
solite on his not showing cause, upon the
at undertaking to pay the costs he ought to
l for his default, in case he had shown cause

decree complained of was pronounced ; (a) and has refused to discharge an order for rehearing in one case, on the circumstances of it, though at the distance of twenty-four years ; (b) and in another case, (c) notwithstanding an agreement was entered into, and signed by the parties, and by consent made an order of court, to submit to such decree as the court *should* make, and that neither party should bring an appeal.

It may be proper here to remark, that an order or decree by consent, cannot be appealed from ; thus, an order for a cause to stand over, with liberty for the plaintiff to amend his bill, by adding parties, is in its nature an order by consent, and therefore cannot be appealed from ; if the plaintiff is dissatisfied with the opinion of the court, as to want of parties, he should let his bill be dismissed, and then appeal from the order of dismissal. (d)

It is necessary here to observe, on the subject of consents, that the consent of counsel is to be given upon their own conception of the authenticity of their instructions ; and if given, is binding

(a) *Mills v. Banks*, 3 P. W. 2.

(c) *Buck v. Fawcett*, 3 P.W. 242.

(b) In the case of *Mr. Onslow*, 3 P. W. 7, in note.

(d) *Beresford v. Adair*, 2 Cox. 156.

Rehearing.

client. (a) And where it happened, that
counsel appeared for the same parties, one
ed to consent, the other instructed by a
t solicitor to oppose, except on certain
the court directed the matter to stand
nd the authorities, under which the soli-
cted, to be verified by affidavit. (b) And it
that a party, by consenting to an order
ential on a decree, does not preclude him-
n the right of appeal. (c)

proper here also to remark, that after an
from the Rolls to the Lord Chancellor, a
g before him will not be allowed. (d) But
ee is first heard at the Rolls, and after

fore, if the bill is dismissed with costs, and there is an appeal generally against such decree, the defendant may, notwithstanding the appeal, sue out a *subpœna* for costs. (a) And if a special application to stay proceedings, pending an appeal, fails, it generally, almost invariably, fails with costs; (b) however, if the party against whom the decree is attempted to be prosecuted, is likely to be put to expense by the proceedings by which the decree is to be carried into effect, the court, in permitting the succeeding party to prosecute the decree, will reserve the consideration, by whom the costs and expenses of these proceedings are to be borne, in case the decree should be reversed. (c)

But the court has sometimes suspended the decree, as to part involving the very point of appeal; as where the decree was for the specific performance of the contract by the vendor, and the dispute was, whether certain premises are comprised in the contract; though the court would not suspend the decree generally, pending the appeal from it, yet the court suspended the execution of the conveyance, permitting the Master

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| <p>(a) <i>Dunster v. Mitford</i>, before Lord Eldon, 20th July, 1815, in <i>Sittings after Trin.T.</i>; <i>Tyson v. Cox</i>, 3 <i>Mad.</i> 278.</p> | <p>(b) <i>Waldo v. Caley</i>, 16 <i>Ves.</i> 215 and 216.</p> <p>(c) <i>Winton v. Newland</i>, before Lord Eldon, 19th March, 1817.</p> |
|---|---|

Rehearing.

ed to settle the terms of it. (a) And the
as suspended the decree upon terms; as
the plaintiff having obtained the usual
t the Rolls, as a mortgagee, a motion was
suspend the execution of the decree till
ths after an appeal to it should be heard;
the court refused to suspend the decree
y, yet it was ordered, that if defendants
ay the plaintiff the interest due from the
filing the bill, and the costs, upon his (the
s) undertaking to repay, if the decree
be reversed, and would consent to the
ment of a receiver, they were to have six
from the time fixed by the Master's re-
And the court has suspended a decree

plication is made to stay the proceedings, it was necessary to state the objections made to the decree; and therefore it was almost impossible, upon hearing the motion, to avoid going, in a great degree, into the merits of the case. (a) But by the 46th of the General Orders of 1828, every application to stay proceedings, upon any decree or order which is appealed from, is to be made first to the judge who pronounced the decree or order.

On a rehearing being ordered, the cause is commonly set down for a certain day, on which it is to be reheard; and two days, at least, before such day, the petitioner is to leave for the Lord Chancellor, the Master of the Rolls, or Vice Chancellor (if the application be to either of the latter judges), a true copy of the order or decree objected to, as also a true copy of the petition for rehearing, (b) and notice of the day of rehearing must be given to the adverse party; and two days' notice is sufficient. (c) In general, the clerk in court for the appellant, is required to sign an undertaking to pay such further costs as the court should direct, beyond the deposit. (d)

(a) *Monkhouse v. the Corporation of Bedford*, 17 Ves. 381.

(c) *Robinson v. Taylor*, 1 Ves. J. 45.

(d) 1 Turn. Cha. Pract.

(b) *Beam. Cha. Ord.* 288; *Harr. Cha. Pract.* 1808, p. 341.

Rehearing.

necessary to add, that upon a rehear-
and also on an appeal from the Rolls, (b)
e may be read which was not produced
original hearing ; and in some cases, the
ppealing has been allowed to go into fresh
e ; (c) but he must give up his deposit. (d)
ord Eldon, in the case of *White v. Fus-*
observes, that it comes to a question
s ; and the rule should be laid down, that
y add to testimony upon an appeal ; still
y, if he succeeds, ought to indemnify the
or not having that evidence at the time it
to have been read. Although the cause,
spect to the party who petitions to rehear,

larly opened as a cause. (a) The solicitor for the appellant should be provided with an affidavit of service of the order for setting down the petition ; and the adverse solicitor ought to be provided with an affidavit, that he has been served with the order to set down the petition. (b)

We have before stated, that it is a rule, that after a decree has been signed and enrolled, there can be no appeal or rehearing ; but there have been instances, where the court, under special circumstances, has been induced to open the enrolment for the purpose of letting in that mode of redress ; as where the party complaining of the decree, applied by mistake, to the wrong place to enter the *caveat*, and the enrolment was very quick ; (c) or where the party was an infant, till within a short time of pronouncing the decree, or was abroad at the time, and his solicitor neglected his cause, and the merits at the hearing were not gone into. (d) But the inability of the party through poverty, to go on with the cause, where no misconduct is imputable to the solicitor, is not sufficient ground. (e)

(a) Sel. Ca. Cha. 13 and 14.

(d) *Kemp v. Squire*, 1 Ves.

(b) 1 Turn. Cha. Pract.

205 and 206.

737.

(e) *Pickett v. Loggon*, 5 Ves.

(c) Anonymous, 1 Ves. 326 ;

702.

Parker v. Dee, 3 Swanst. 334,

in note.

Enrolment and Exemplification of Decree s.

In general, the court will not open the enrolment, after the merits have been gone into ; (a) ; even in such a case, if the party enrolled the decree, has said that which might lead the other party to believe that the decree would be enrolled, and in the mean time enrolls the decree, the court will vacate the enrolment. (b) It is proper to add, that a rehearing will not be granted after enrolment, though only one of the defendants has signed and enrolled the decree. (c)

SECTION III.

of the several proceedings recited in it, and a memorandum is written at the foot of the last sheet of the docket, and is signed by the six clerk or his deputy, certifying that the docket agrees with those records. If the decree was pronounced by the Lord Chancellor, it must then be presented to him for his signature; if by any person sitting for him, or by the Master of the Rolls at the Rolls, or by the Vice Chancellor, it must be signed both by the person pronouncing the decree, and by the Lord Chancellor; in the former case, the docket is left by the clerk in court, with the bag-bearer of the six clerks' office, and he leaves it with the Lord Chancellor's secretary of decrees and injunctions, to be signed by that judge. But if the decree is made by the Master of the Rolls, or Vice Chancellor, previously to its being signed by the Lord Chancellor, the bag-bearer leaves the docket with the secretary of the Master of the Rolls, or of the Vice Chancellor, to be signed; after which, the signature of the Lord Chancellor is to be procured in the manner above stated; the day of the month, and the year, when the docket was signed, are written upon the foot of the docket. Decrees are to have the six clerks' hands, before they are presented for signature. (a)

(a) Beam. Cha. Ord. 112 and 206.

Enrolment and Exemplification of Decrees.

Decrees and dismissions pronounced upon the cause in this court, are drawn up, and enrolled, before the first day of the Michaelmas or Easter term after the same are so pronounced respectively, and not at any other time, without special leave of the court. (a) Every decree or dismissal shall be presented to the register of this court, or his deputy, or by the clerk, to the Lord Chancellor, Lord Keeper, or Lord of the Rolls, to be signed before it be signed by the six clerk, to whom it belongeth, of his own hand-writing, or by his deputy in his stead. (b) When the docket is signed, the court enrolling the decree, engrosses an copy of it upon parchment rolls, which

viously obtained for that purpose, as it is like a judgment at law, which, if given, may be entered up, after the party's death. (a)

It is proper here to observe, that when a suit becomes abated, after a decree signed and enrolled, it was anciently the practice to revive the decree by a *subpæna* in the nature of a *scire facias*, upon the return of which, the party to whom it was directed, might show cause against the reviving of the decree, by insisting that he was not bound by the decree, or that for some other reason, it ought not to be enforced against him, or that the person suing out the *subpæna* was not entitled to the benefit of the decree; but if there had been any proceedings subsequent to the decree, this process was ineffectual, as it revived the decree only, and the subsequent proceedings could not be revived but by bill; and the enrolment of decrees being now much disused, it is become the practice to revive in all cases indiscriminately by bill. (b) An exemplification is the copy or example of a matter recorded or enrolled, as patent, depositions, &c.; and it is made out from the enrolment thereof, and sealed with the great seal; and such exemplifications are as effectual to be pleaded or produced in evidence as the decrees themselves are.

(a) Wy. Pract. Reg. 155.

(b) Mitf. 64 and 65.

Enrolment and Exemplification of Decrees.

bills, answers, depositions, and matters of fact, are exemplified as well as decrees. (a) Nothing but matter of record ought to be exemplified; and therefore, all decrees, deeds, &c., must be enrolled before they are exemplified. (b) Proofs cannot be exemplified without bill and answer, and therefore, if a bill be set aside for irregularity or impropriety of jurisdiction, &c., as not proper for this court, or if it was by way of revivor, when it should be on the original bill, so that there was never such a bill in court, the depositions in such cases, cannot be exemplified, seeing the bill could not. (c) As is said, although a cause be dismissed at the instance of the parties, yet the parties may have the depositions

SECTION IV.

Bill of Review.

The decree having been signed and enrolled, another mode of procuring a reversal of it in this court, is by bill of review ; which may be brought either upon error of law, appearing in the body of the decree itself, or upon discovery of new matter. (*a*) In the former case, the bill may be brought without leave of the court previously given ; in the latter case, the leave of the court must be previously obtained upon an affidavit that the new matter could not be produced, or used by the party claiming, at the time when the decree was made ; (*b*) and there must be a deposit of 50*l*. (*c*) And the matter must be such, as if unanswered in point of fact, it would either clearly entitle the plaintiff to a decree, or would raise a case of so much nicety and difficulty, as to be a fit subject of judgment in a cause. (*d*) It is sufficient, if the new matter did not come to the party's knowledge till after publication, or when, by the rules of the court, he could not make use

(*a*) Mitf. 78 ; and 1st of the
Gen. Ord. of Lord Chancellor
Bacon ; Beam. Cha. Ord. 1
and 2.

(*b*) Mitf. 79.

(*c*) Beam. Cha. Ord. 313.

(*d*) Ord v. Noel, 6 Mad. 131.

Bill of Review.

(a) When a bill of review is brought for error in the decree, the defendant puts in a plea and demurrer, a plea of the decree, and a demurrer to the bill, and opening the enrolment. (b)

A bill of review cannot be brought after twenty years have elapsed from the time of pronouncing the decree, which has been signed and enrolled. (c) After a demurrer to a bill of review has been sustained, a new bill of review on the same ground, cannot be brought. (d)

The bringing of this bill does not, any more than a petition of rehearing, prevent the execution of the decree impeached: for by 3rd of

decree alone. But by 4th Order, if any act be decreed to be done, which extinguisheth the party's right at the common law, as making of assurance or release, acknowledging satisfaction, cancelling of bonds or evidences, and the like, those parts of the decree are to be spared, until the bill of review be determined; but such sparing is to be warranted by public order made in court.

If the decree sought to be impeached has not been signed and enrolled, it may be examined and reversed on a species of supplemental bill, in the nature of a bill of review, where *any new matter* has been discovered since the decree. (*a*) But there is no instance of a bill in nature of a bill of review upon *error apparent*; for where the objection is upon matter of law apparent, or a mistake of law, to be collected from all the pleadings and evidence, the decree not being signed and enrolled, it is subject of rehearing, and there is no occasion for a bill in nature of a bill of review, unless a supplement bill is necessary to introduce new facts; in which case, the cause will come on to be reheard on the matter of that supplemental bill, together with a rehearing of the original cause. (*b*) It is necessary to obtain

(*a*) Mitf. 80 and 81.

(*b*) *Perry v. Phillips*, 17 Ves.
178.

Appeal to the House of Lords.

re of the court to file a supplemental bill
nature, and to make a deposit of 50*l.*; and
ne affidavit is required for this purpose, as
ssary, to bring a bill of review on disco-
new matter in it. (a)

SECTION V.

Appeal to the House of Lords.

rd mode of setting aside a decree or order
nced in Chancery, is by appeal to the
of Lords. But this appeal does not stay
ceedings in the suit in the court below. (b)

warmly controverted in the House of Commons in the reign of Charles II. (a)

An appeal cannot regularly be made to the House of Lords till after an appeal before the Lord Chancellor, if the cause was heard by the Master of the Rolls, or the Vice Chancellor; unless the decree is signed and enrolled; when there can be no rehearing thereof before the Lord Chancellor; but such decree must be appealed from to the House of Lords.

The appeal is to be signed by two counsel, and exhibited by way of petition. The counsel signing it must be either such, as were of counsel in the same cause in the court below, or attend as counsel at the bar of the House, when the appeal is heard. (b) The petition must be lodged with the clerk of the House of Lords, with whom the appellant is to deposit 20*l.* to recompense the other party his costs, in case he fails in his appeal.

The appeal must be presented within fourteen days, to be accounted from the first day of every session of parliament after the recess; after which, no petition of appeal will be received during every such sitting, unless the decree be made, whilst the

(a) 3 Black. 454, 455.

(b) Lords' Journal, 3rd of March, 1697.

Appeal to the House of Lords.

ent is actually sitting ; in which case the must be presented within fourteen days ch decree. (a) Cross appeals must be pre- within one week after the answer to the l bill. (b)

petition of appeal from any decree signed rolled, or extracted, will be received by the after five years from the signing and enroll- extracting of such decree, and the end of n days to be accounted from the first day ession next ensuing the said five years; un- ch person entitled to such appeal be within e of twenty-one, or covert, *non compos* imprisoned, or out of Great Britain, &c. ;

200*l.* to pay such costs to the defendant in the appeal as the court shall appoint, in case the decree be affirmed. (a)

The appeal being thus lodged, and read in the House, the respondent is ordered to have a copy of the appeal, and required to put in his answer thereto on the day fixed ; and a day is appointed for hearing the cause in the order as the appeals come in ; and notice is given thereof to the appellant's solicitor, who may get a summons served on the other side to appear, &c.

When an order is made for the respondent to answer by a time limited, and no answer is put in by that time, a peremptory day is appointed for putting in the answer without further notice. (b)

The clerk to whom any answer is delivered, is to indorse thereon the day on which such answer is brought in ; and the names of the parties answering, and of the appellants, are to be entered on the same day in the journals of the House. (c)

When an order has been made by the House for the respondents to answer by a time limited, if

(a) Lords' Journal, 27th of January, 1710.

(b) Lords' Journal, 19th Jan. 1719.

(c) Ibid. 5th April, 1720.

Appeal to the House of Lords.

sion, wherein such order is made, determined before the time so limited shall expire, and never be put in during the same session, of such order upon the respondents, five before the first day of the next session, is service; and the appellant may apply for a return day for putting in the answer, in which the respondents shall not put in their answer more than three days from the first day of the next session.

(a)

If the answers are put in to appeals during the session, and for hearing whereof no day is fixed in such session, if neither party apply for a return day, the answers shall be taken as taken eight days after the first day of the next session.

Printed copies of the appellant's, and also the respondent's case, are usually delivered to the Lords, for their better information of the matter in controversy; which cases, before they are printed, are always signed by two counsel, viz., the plaintiff's case by two of his counsel, and the defendant's case by two of his counsel, whose respective names are printed at the bottom of the cases. The counsel must be one or more of those who attended at the hearing of the cause in the court below, or shall be of counsel at the hearing in the House. (a)

Such appeals, for hearing whereof days shall be appointed, which shall not be determined in the same session, shall be heard and determined in the beginning of the next session, in the same order as they stand to be heard, without any new application, upon the Wednesday in the week next after the week in which any subsequent session shall begin; the second upon the Friday following, and the third upon the Monday following; and from thence the rest of the said appeals in course upon every Wednesday, Friday, and Monday, until they shall be all heard and determined; and in case any such appeal shall not be adjourned by order of the House, made before the day on which the same is appointed to be heard, and the

(a) Lords' Journal, 19th April, 1698.

Appeal to the House of Lords.

r parties on one side shall attend by their
and the party or parties on the other side
ot attend by their counsel on the said day
ed for hearing thereof, such appeal shall
d *ex-parte* ; and in case neither of the said
o such appeal shall attend by their counsel
aid day appointed for hearing thereof, then
eal shall stand absolutely dismissed ; but
prejudice in this last case to the appellant
lants presenting any new appeal thereafter
manner as the said appellant or appellants
ave done, in case such former appeal had
n presented to the House, as he or they
advised. (a)

dence on their side is read ; then the other counsel for the appellants may make observations in the evidence : the same course is to be observed by the counsel for the respondents, and one counsel only for the appellants is to reply. (a) No new evidence is permitted to be read. (b)

And after hearing counsel on the appeal, and upon the answer, on due consideration thereof, the Lords order and adjudge, that the decree of the Court of Chancery be varied in such matters as their Lordships think fit, or that the petition and appeal be dismissed, and the decree affirmed with costs, &c. A majority of the Lords finally determine the cause. Sometimes the House of Lords direct an issue at law for trial of some point necessary between the parties, and that after such trial, they should resort back to the Court of Chancery for its further directions in that matter.

Whatever order is made in parliament upon the appeal, ought to be made an order of this court ; and an order for that purpose is obtained upon motion as a matter of course, upon production of a copy of the order of the Lords, signed by the clerk of parliament. (c)

(a) Lords' Journ. 2nd March, 1727.

(b) *Addison v. Hindmarsh*,
1 Vern. 443.

(c) *Vide* 1 Ves. 419.

Execution of Decrees.

SECTION VI.

Execution of Decrees.

first step to enforce the execution of a decree, if the party against whom it is pronounced or neglects to obey it, is a writ of execution against the decree against him; which is a process of the court, under its seal, reciting an order or decree of the court, final or interlocutory, or the decree thereof, or of some part thereof, and requiring obedience to so much of the ordering part as is directed, and concerns the party to perform. (a) It is proper to observe, that as the decree is made against a party for *payment of money* or *transfer of property*, it does not ordinarily, like an interlocutory or-

By the 13th Order of the General Orders of 1635, (a) the writ, if it be only for payment of money, shall make no other recital, but to this or the like effect: "Cum per quoddam decretum in Cur: Cancellariæ die Anno Regni ordinat: et adjudicat: existit quod tu solveres A. B. cent: libr: legal: monet: Ang: tibi præcip: et firinit: injung: mandam: quod prædictum cent: libr: præfato A. B. debito modo: et hoc nullatenus omit," &c. And if the money, by the decree, be payable at certain days or places, then the same days and places to be expressed in the writ, without any further recital. And if the decree be for doing other things to be performed by the party or parties to whom the said writ is directed, then no more shall be recited in the writ but the very decretal order, unless the decretal order do in such manner refer to a report, or a certificate, as without recital of those points of the report or certificate, which are to be performed by the parties to whom the said writ is directed, it will not appear what is to be by them performed; and in that case, so much of the report or certificate as is to be performed by the said parties, shall be recited, and the order confirming the same, and no more, unless it be desired by the party suing out the said writ, and the fee thereof to be paid, shall be after the rate prescribed in the table of fees, and no more.

(a) Beam. Cha. Ord. 76.

Execution of Decrees.

writ of execution, under the seal of the court, is shown to the party against whom it issues ; a true copy of it, is at the same time to be delivered to him. In general, service of this writ on the clerk in court is not good ; (a) but must be made on the party himself ; however, there are exceptions to this rule ; as where the defendant was not in court when the decree was made ; (b) where he avows his determination not to appear, and conceals himself, and has not a known place of residence, (c) or, simply, where the defendant was not to be found. (d) In these cases, the court will order service on the clerk in court as good service. Where a party absents himself to avoid personal service of an order to pay

came to the party's hands, this will be sufficient. (a) If the clerk in court of the party against whom the decree is made, is dead, a *subpœna ad faciendum attornatum*, must be sued out, and served, before any process can issue against the party refusing to execute the decree; (b) and if he is avoiding service, the proper course is to move that service of this *subpœna* on the solicitor may be good service. (c)

If the decree be for payment of money, and the court leaves it to the Master to appoint time and place for payment, it is usually appointed to be paid at the Chapel of the Rolls, between ten and twelve; but where the Master is not directed to appoint time and place, he always directs payment to be made to the plaintiff *generally*, pursuant to the order on the hearing. (d) The person who serves the writ of execution, supposing that the party who, under the decree, is entitled to demand and to receive the money, does not himself serve the writ, must have and show to the party who is to pay the money, a letter of attorney from the other party, to receive the money, and must demand it, or else the not paying it will be no contempt. (e) But if the defendant is not to be

(a) Wy. Pract. Reg. 203.

(d) Gilb. For. Rom. 170.

(b) Ratcliff v. Roper, 1 P. W. 419.

(e) Wy. Pract. Reg. 205; Wilkins v. Stevens, 19 Ves. 116.

(c) Francklyn v. Colhoun, 12 Ves. 2.

Execution of Decrees.

and the court thereupon directs that service of a writ of execution, and writ of execution, on the defendant in court, should be good, it is not necessary, for the plaintiff to bring the defendant into contempt, to appear to the clerk in court a letter of attorney to receive the money; for he is not to pay the money, but to give his client notice to do it; (a) It is sufficient to show the order and writ, and to have a copy with the clerk's agent, at his seat in the office. (b)

It may be proper here to remark, that where the subject of the suit, or of the application to the court, is money belonging to a married woman, the court will not permit the husband to receive

of attorney executed by husband and wife, empowering a person to consent, will not be sufficient. (a) The married woman must be examined by the commissioners separate and apart from her husband; and her examination must be taken down in writing, and signed by her and the commissioners, who then certify to the court the execution by them of the commission; and then the commission, together with the certificate and examination, is returned to the court by the commissioners; and in the subsequent application to the court to have the money paid to the husband, agreeably to the wife's consent, the signature of the commissioners to the certificate and examination, and of the wife to the latter, must be verified by affidavit. (b)

If the party against whom the decree is made, pays no obedience to it, after he has been served with the writ of execution, recourse may then be had, on filing an affidavit of the service of this writ, to the same processes of contempt, as issue against a defendant for not appearing and answering, as attachment, proclamations, commission of rebellion, serjeant at arms, (c) and sequestration. If the defendant is taken on attachment, for not

(a) *Parsons v. Dunne*, 2 Ves. 60. turn, in *Tasburgh's case*, 1 Ves. and B. 509.

(b) See the form of the re- (c) *Beam. Cha. Ord.* 206.

Execution of Decrees.

the writ of execution of the decree for
t of a sum of money, the plaintiff may in-
having the subsequent costs, before the
nt is liberated; but if the plaintiff dis-
the defendant, on receiving the principal
rest only, the plaintiff loses his claim to
equent costs. (a) When the disobedient
arrested under a commission of rebellion,
performing a decree, he may be bailed;
ay, under that process, for not appearing
ering; but if the commissioners refuse
ey ought to bring the party into court
delay. (b)

defendant has been taken upon any of

the plaintiff is not entitled to sue out sequestration against the defendant, until the return day of the writ. (a) Where the defendant is a peer, the order for a sequestration, is in the first instance, *nisi*. But where an order is made against a peer, for a sequestration for non-performance of the decree, and an application is made to discharge the order for irregularity, on the ground that the defendant had not been served with the order *nisi*, the court will not discharge the order, but stay the sequestration for a short time, to give the defendant an opportunity of complying with the direction of the decree: it would have been different, if the defendant came here professing his willingness to obey the decree; it would then be very proper for the court to enquire into the circumstances that had happened, and see whether any person had been guilty of an abuse of its process. (b)

If a decree be against a corporation aggregate, and it is not obeyed, the process against them is the same as a contempt for not appearing or answering; viz., a *distringas*, and afterwards a sequestration, excepting that in the former case, it is not necessary to sue out more than one *distringas*; and upon the return on that writ of "issues forty shillings," the court will grant an

(a) *Martin v. Kerridge*, 3 P. W. 240.

(b) *Shuttleworth v. Lord Lonsdale*, 2 Cox. 47.

Execution of Decrees.

prohibere for a sequestration. The form of the writ is in general terms, to compel the defendant to appear and answer a contempt alleged against him; the indorsement on the writ expresses the nature of the contempt. (a)

A distinction is likewise to be observed between a writ of sequestration for not appearing or answering, and a writ of sequestration for not performing a decree. We have seen that in the former case, the writ is not to be applied in satisfaction of the plaintiff's demand; (b) but where it issues for disobedience to a decree, if it be for the payment of money, the goods of the party, and the profits of his real estates, will be, under

tion of the property sequestered ; but they ought to bring the money arising from the payment of rent, or otherwise, into court ; and the party under the decree, who is desirous of having the property sequestered applied in satisfaction of his demand, must apply to the court for that purpose. It is said in a note in 2 Vern. 396, that in the case between Dr. Salmon and the Hamborough Company, the members in their private persons were made liable, the company having no goods.

If the effects sequestered are insufficient to satisfy the decree, the serjeant-at-arms may be revived. (a)

It is proper to observe, that if the sequestrators seize real estate of the defendant, and another person claims title to it, such claimant will not be permitted to sue the sequestrators in a court of law ; but the court itself will examine the title ; (b) and for that purpose, the party is not obliged to bring a bill, but will be permitted, upon motion by him, to be examined *pro interesse suo*, before the Master. But such an order can

(a) Barnsly v. Powell, 1 Dick.
130.

(b) Angel v. Smith, 9 Ves.
338 ; Kaye v. Cunningham, 5
Mad. 406.

Execution of Decrees.

made upon the application of the party, who is to be examined, or by his counsel, and the plaintiff is to exhibit interrogatories for that purpose. And an order for leave to exhibit interrogatories to falsify an examination *pro interesse suo*, may be obtained by the court of course. (b) The parties may enter evidence in proof touching the title to the estate in question; and the Master afterwards reports the matter to the court, who gives judgment thereon. Taking exceptions to the Master's report is not the proper mode; but the matter may be set down for further directions on the Master's report. (c) It seems, that the plaintiff is to reply to the examination, and put the

It seems that a sequestration to compel obedience to a decree, as well as a sequestration as mesne process, abates by the death of the plaintiff. (a) But in the former case, upon reviving the decree against the heir, or executor, or other persons bound by it, the sequestration may be revived against the same party by motion. (b) And the court will not, immediately on the death of the plaintiff, turn the sequestrators out of possession; but give time to revive the sequestration in a certain time. (c)

But it is proper to observe, that there is in some cases, a shorter mode of proceeding to compel a defendant to obey a decree, than that which is above pointed out; for although formerly, it was the practice, that a plaintiff should proceed exactly in the same manner against a defendant in contempt for not obeying a decree, as for not appearing and answering, that is, by going through the whole line of process, from attachment to sequestration, yet it appears, that about fourteen or fifteen years before Lord Chief Baron Gilbert compiled his treatise, entitled "*Forum Romanum*," the

(a) *Wharam v. Broughton*, vide *Smith v. Wilmer*, 3 Atk. 1 Ves. 182; *Anon.* 1 Vern. 118; 594.

Morrice v. the Bank of England, (b) *Gilb. For. Rom.* 87.

Ca. Temp. Talb. 222. Sed (c) *White v. Hayward*, 2 Ves. 464.

Execution of Decrees.

made upon the application of the defendant, who is to be examined, to be shortened, (a) and the plaintiff's necessity of going through for that purpose before the plaintiff could move to prohibit interference against the defendant; and *pro in* observed by Lord Chief Baron of this shortening of this process was the practice of the court, when they the defendant, on entering his appearance the register, that if he disobeyed the order of the court, he should immediately stand committed; and if a man might be committed for non-performance of an interlocutory order, when he recorded his appearance, and departs in

in certain cases, against a defendant who disobeys the decree. Thus, if by the decree, a party is ordered to produce deeds and writings in the Master's office (a) or to attend to be examined before him upon interrogatories, (b) upon taking out a warrant from the Master, which is served on the party's clerk in court, and upon the party's default to do either of these acts, and the Master's certificate of such default, an order, which is called a four-day's order, may be obtained upon a motion of course, that the party should do the act in question within four days from notice thereof, or that the serjeant-at-arms should go against him. (c) And if the party disobey the order, the court will then make an absolute order that he should stand committed. (d) And in case the order be to answer interrogatories, and he puts in an insufficient examination, an *absolute* order for the serjeant-at-arms may be obtained against him. (e) The Master's certificate of disobedience to a decree, directing deeds, papers, and writings, to be produced before him, need not be filed within four days after the certificate is signed; it is suf-

(a) Harr. Cha. Pract. p. 332; Gilb. 165; Seton's Forms of Decrees in Equity, 420.

(b) Seton's Forms of Decrees in Equity, p. 422.

(c) Harr. Cha. Pract. 332; Gilb. 165; vide title, Ord. ante 246.

(d) Carleton v. Smith, 14 Ves. 180.

(e) Weston v. Jay, 1 Mad. 527.

Execution of Decrees.

if it be filed before the four-day order is
ed out. (a) But the Master's certificate, to
t a motion for an absolute order for com-
nt, must bear date on the day of the motion
order; otherwise *non constat*, that the party
t, since the certificate, and before the mo-
beyed, and protected himself from, the
(b)

the shortening of the process in execu-
f a decree, seems confined to the two
of productions of deeds, &c. by a party
Master's Office, and of attendance by a
or examination before the Master upon in-

the payment of money, where the court has shortened the process by making an order for payment of the sum, or in default, a commitment. (a) It is true that in the case of *Wilkins v. Stevens*, as reported in 19 Ves. 117, it is stated, that the Master's report ascertaining a sum to be due, a short order was obtained, that *the party* should pay the money in four days, or stand committed. But it appears from the register's book (*Seton's Forms of Decrees in Equity*, p. 430), that the order in question was not made between *parties* in a suit, but that it was for the payment of costs found due upon taxation from a defendant to his solicitor.

It appears in a former part of this work (see title Orders, p. 247), that where an order is made upon a person not a party to the suit, a writ of execution does not issue; but that the mode of proceeding is by obtaining an order for performance of the act required, by a given day, and on default, another order for performance of the act on another day, or that he should stand committed. (b) But notice must be given of the motion for the last-mentioned order. (c) But it seems that in

(a) See 1 Turn. Cha. Pract. 372; *Bowes v. Strathmore*, 12 Ves. 325.

(b) *Anon.* 14 Ves. 207; *Davies v. Cracraft*, 14 Ves. 144; 71.

Vickers v. ———, 3 Bro. C. C.

(c) *In re Partington*, 6 Mad.

Execution of Decrees.

ty, the intermediate order is not neces-

be proper also to add, that in the case of
ction restraining a party from doing any
r act, if he is guilty of a breach of the in-
the court will at once commit him to the
r the offence. (b) The court seems to
nsidered this to be such a case of con-
s to require this summary proceeding.
ppears that by the ancient practice of the
ne mode of proceeding for breach of an
on, was by attachment, and the ordinary
s. (c)

jeant-at-arms, and still refuses to do the act required of him, the plaintiff may obtain a sequestration against him. (a) But the court will not issue a commission of rebellion against the party in contempt, because he shut himself up, except on a Sunday, which prevented the serjeant-at-arms, but it would not the commissioners, from apprehending him. (b)

If the decree is for the delivering up the possession of lands to the plaintiff, and the defendant does not obey the decree, the plaintiff must sue out a writ of execution of the decree, and upon default, an attachment, (c) which is not executed, but only issues as a foundation for the subsequent process. (d) Upon the issuing of the attachment, an order will be made of course, upon affidavit of service of the writ of execution, of demanding possession, refusal, and of the issuing of the attachment, for an injunction, commanding the possession of the land to be yielded up to the plaintiff; and if this be disobeyed, upon affidavit of the service of it, the court will grant a writ of assistance,

(a) *Lupton v. Hescott*, 1 Sim. and Stu. 274; *Trigg v. Trigg*, and *Detillin v. Gale*, in the note to that case. *Gilb. For. Rom.* 85. (c) *Dove v. Dove*, 2 Dick. 617; 1 Bro. C. C. 176; 1 Cox. 101, S. C.

(d) *May v. Hook*, cited in *Dove v. Dove*, 2 Dick. 619.

(b) *Edwards v. Pool*, 2 Dick. 693.

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s directed to the sheriff where the land commanding him to be aiding and assisting the party into possession. (a) The or the *injunction* for the delivery of possession affects the tenant, which the order for the defendant to deliver possession does not. (b)

may be proper here to observe, that if the defendant, upon the service of any of these process, beat the person serving it, or use contumacious expressions against the court, or its officers, it is a contempt, for which he may be punished. And here I must beg leave to refer to what has been said in a preceding page, (c) respecting the service of sub-

A D D E N D A.

UNDER title "*Attachment*," the following case to be added :

If a defendant, who has been taken on an attachment, still refuses to answer, the plaintiff may at the same time proceed to enforce an answer by the process of this court, and bring an action against him and his sureties, on the bond given to the sheriff under the attachment. (a)

Under title "*Sequestration*," the following cases :

Query.—Whether it is regular to issue a sequestration against the property of a party who is in the Fleet, under process from the Common Pleas, and is detained also upon an attachment from the Court of Chancery, but who has not been brought up by *habeas corpus* to the bar of the court, in order to be turned over to the custody of the warden. (b)

(a) *Beddell v. Page*, 2 Sim. 224.

(b) *Const v. Barr*, 2 Russ. 659.

Addenda.

regularity of a sequestration is waived, if
y against whom it is issued gives the se-
ors directions how to deal with his pro-

title "*Petition*," the following cases :
e *covert*, tenant in tail in remainder of mo-
e laid out in land, by arrangement with
t for life, and on a private examination,
e 7th Geo. IV. c. 45, consented to the
of a proportion of the money to her hus-
d the order was made accordingly. (b)

An order of reference to the Master
tion presented under Lord Eldon's Act

right to expect their attendance beyond that time; and even if I sit in court, my sitting there is the same thing as if I were to hear the application in my own house. Under such circumstances, when we have not the assistance of a registrar, a *petition* is of great use, and the proper course is to send to the Chancellor the petition and affidavits, in order that he may make such order thereupon as may be just."

Under title "*Affidavit*:"

A party cannot refer, for impertinence, an affidavit filed in support of motion, if, after that affidavit was filed, he has filed any affidavit in opposition to the motion. (a)

Under title "*Order*," the following cases:

On a motion to discharge an order made by the Vice Chancellor, affidavits may be read, sworn after the order was made, and stating facts which were not before the Vice Chancellor. (b)

An order on two solicitors, as partners, is not duly served by serving it on one of them, and leaving a copy at the place where the partnership business is carried on. (c)

(a) *Keeling v. Hoskins*, 2 Russ. 319.

(b) *Const v. Barr*, 2 Russ. 161.

(c) *Young v. Goodson*, 2 Russ. 255.

Addenda.

title "*Receiver*," the following cases :
grantor of an annuity, secured by an
charge on certain lands, which are sub-
prior charge, resides abroad, but by his
continues in receipt of the rents and profits;
t, on the application of the annuitant, will
a receiver, though the grantor has not
to the suit. (a)

receiver, though he passes his accounts and
balances regularly, is not entitled to
interest, for his own benefit, of monies
come into his hands, in his character of
during the intervals between the times
of his accounts. (b)

ing only to prove exhibits, may be examined before the Master, on interrogatories, to prove other exhibits, without a special order. (a)

The refusal of a witness to be cross-examined is no reason for suppressing his deposition; but the adverse party must at the time enforce such right of cross-examination as he has. (b)

A plaintiff is entitled to move for a commission to examine witnesses abroad as soon as the defendant has obtained an order for time, though he has neither filed his answer, nor is in contempt. (c)

It appears, from the statement of the registrar in the last-mentioned case, 2 Russell, 544, that in *Noble v. Garland*, referred to ante p. 406, a commission to examine witnesses abroad had been granted, though the defendant neither had answered, nor was in contempt, but had merely obtained order for time.

Query.—Whether it is necessary that the affidavit in support of a motion for a commission to examine witnesses abroad, in aid of an action at law, should state the names of the witnesses, or the points to which they are to be examined. (d)

(a) *Courtenay v. Hoskins*, 2 Russ. 253.

(b) *Courtenay v. Hoskins*, 2 Russ. 253.

(c) *Mendizabal v. Machado*, 2 Russ. 540.

(d) *Mendizabal v. Machado*, 2 Russ. 540; but see ante 487.

Addenda.

er title "*Proceedings in the Master's*

upport of a charge brought in under the de-
ro witnesses, examined by the plaintiff to
he defendant's hand-writing, said that they
believe it to be his hand-writing. Leave
ren to the plaintiff to examine fresh wit-
to the same point. (a)

er title "*Setting down Cause for Hearing :*"

solicitor for the party who sets down the
must deliver to the register, when the cause
on to be heard, a copy of the title of the
and the prayer of the bill.

Under title “ *Issue* :”

Where a party wishes to obtain a new trial of an issue, he must first, on an *ex-parte* application, satisfy the judge in equity that there is a reasonable ground for sending to the judge who tried the issue, for his notes of the trial. (a)

Under title “ *Costs*,” the following cases :

A next friend cannot sue *in forma pauperis*. And it should seem that an objection to his ability to pay costs must be taken, and the application made to the court by affidavit, before answer. (b)

A plaintiff, under an order by the Secretary of State, under the Alien Act, to be removed out of the kingdom, (c) and an ambassador’s servant, (d) have been ordered to give security for costs.

The Master was ordered to tax the costs of all parties, and the amount was directed to be paid out of the assets of the testator in the cause, by his executors, who were to be at liberty to pay the costs of certain parties, to A. B. their solicitor. A. B. was an attorney of K. B. and C. P., but had

(a) *Morris v. Davies*, 3 Russ. 318.

(b) *Anonymous*, 1 Ves. J. 410.

(c) *Seilas v. Hanson*, 5 Ves. 26.

(d) *Good v. Archer*, 2 P. W. 452.

for an order on the
date and tax A. B.
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A sworn clerk in
and an attorney on
and hold him to spe

(a) Prebble v. Bagshaw
Sim. 246.

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